JD(ATL)–19–06
Hope, AR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MEYER'S BAKERIES, INC. and
SOUTHERN BAKERIES, LLC

and **CASES 26-CA-21843**
26-CA-22045
CHAUFFERS, TEAMSTERS AND **26-CA-22059**
HELPERS LOCAL UNION NO. 878, **26-CA-22095**
affiliated with INTERNATIONAL **26-CA-22145**
BROTHERHOOD OF TEAMSTERS **26-CA-22207**
26-CA-22232

and

BAKERY, CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO, CLC,
LOCAL 111

and

MICHAEL W. CHAMLEE, an Individual

and

NORMAN D. WILSON, an Individual

Rosalind E. Eddins, Esq., Counsel for the General Counsel.
Royce Stogner, President, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC, Local 111.
Andrew M. McNeil, Esq. and ***Phillip J. Ripani, Esq.***, for Respondent Southern Bakeries, LLC.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Texarkana, Arkansas on February 14, 15, and 16, 2006. The original charge in 26-CA-21843 was filed by Chauffeurs, Teamsters and Helpers Local Union No. 878, affiliated with International Brotherhood of Teamsters, herein Teamsters Local 878, on September 7, 2004 and amended on September 21, 2004. The charge in 26-CA-22045 was filed by Michael W. Chamlee, an individual, herein Chamlee, on April 4, 2005. The original charges in 26-CA-22059 and 26-CA-22095 were filed by the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC, Local 111, herein BCTGM Local 111, respectively on April 13, 2005 and May 11, 2005. The charge in 26-CA-22145 was filed by Chamlee on July 1, 2005. The original charge in Case 26-CA-22207 was filed by Teamsters Local 878 on August 30, 2005 and amended on November 2, 2005. The charge in 26-CA-22232 was filed by Norman D. Wilson, herein Wilson, on September 19, 2005. Based upon the allegations contained in the above-referenced charges, the Regional Director for Region 26 of the National Labor Relations Board, herein the Board, issued an Order Consolidating Cases Consolidated Complaint and Notice of Hearing on November 30, 2005.

The consolidated complaint alleges a number of violations of the National Labor Relations Act, herein the Act, by Meyer's Bakeries, Inc., herein Meyer's, and by Southern Bakeries, LLC, herein Southern. There is no dispute that in February, 2005, Meyer's initiated bankruptcy proceedings. Southern does not dispute that on or about March 28, 2005, it hired a majority of individuals who were previously employed by Meyer's at Meyer's facility in Hope, Arkansas. Southern also admits that it assumed a duty to bargain with Teamsters Local 878 and BCTGM Local 111.

The consolidated complaint alleges that on or about August 18 or 19, 2004, agents of Meyer's engaged in two incidents in violation of Section 8(a)(1) of the Act. The consolidated complaint also alleges that Meyer's issued a warning to Chamlee on August 20, 2004 and later disciplined Chamlee on March 17, 2005 because Meyer's believed that Chamlee was engaged in activities on behalf of Teamsters Local 878. The consolidated complaint further alleges that Southern refused to hire Chamlee on March 28, 2005 because of his concerted activities and activities on behalf of Teamsters Local 878. It is also alleged that Southern terminated Wilson because of his union activities and because Chamlee and BCTGM Local 111 filed charges with the Board and employees gave testimony to the Board in the form of affidavits.

Additionally, the consolidated complaint alleges a number of 8(a)(5) violations by Southern. Specifically, the consolidated complaint alleges that Southern implemented fifteen distinct unilateral changes between April 1, 2005 and October 28, 2005 without prior notice to or bargaining with Teamsters Local 878 or BCTGM

Local 111. It is also alleged that Southern refused to meet and bargain with BCTGM Local 111 unless BCTGM withdrew an unfair labor practice charge. The consolidated complaint further alleges that in mid-May 2005, an agent of Southern dealt directly with bargaining unit employees by soliciting employees' approval regarding a schedule change in the maintenance department. Southern and Meyer's filed timely answers and denied the allegations in pertinent part.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by Southern and Counsel for the General Counsel, I make the following:

Findings of Fact

I. Jurisdiction

At all material times and prior to March 28, 2005, Meyer's, a corporation, with an office and place of business in Hope, Arkansas, engaged in the operation of a commercial bakery where it sold and shipped from its Hope, Arkansas facility, goods and materials valued in excess of $50,000 directly to points located outside the State of Arkansas. Since on or about March 28, 2005, Southern, an Indiana limited liability company, with an office and place of business in Hope Arkansas, has engaged in the operation of a commercial bakery. Based upon a projection of operations since about March 28, 2005, Southern will annually sell and ship from its Hope, Arkansas facility goods valued in excess of $50,000 directly to points located outside the State of Arkansas. Meyer's admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act for the relevant time period. Southern admits, and I find, that is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act during the relevant time period. Meyer's and Southern admit and I find that Teamsters Local 878 and BCTGM Local 111 are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Prior to March 28, 2005, Meyer's operated a commercial bakery facility in Hope, Arkansas. There were approximately 250 to 300 production and sanitation department employees represented by BCTGM Local 111. The collective bargaining agreement in effect on March 28, 2005, covered the period from June 16, 2003 to

[1] Prior to the commencement of the hearing and during pre-hearing telephonic conferences, Meyer's participated through its legal counsel. Meyer's did not however, participate in the hearing and did not file a post-hearing brief. Citing *United States Service Industries*, 324 NLRB 834 (1997), Counsel for the General Counsel argues in her post-hearing brief that Meyer's had sufficient and adequate notice of the hearing and elected not to participate in the hearing. I agree, and find that Meyer's was afforded a full opportunity to participate without violation of any due process rights.

June 16, 2007. There were approximately 60 employees classified as shipping, receiving and maintenance employees who were represented by Teamsters Local 878. The collective bargaining agreement in effect on March 28, 2005 between Meyer's and Teamsters Local 878 covered the period for June 13, 2004 to June 13, 2008.

As Vice-President of Human Resources for Meyer's, Rick Ledbetter reported directly to Meyer's President; Jeremy Hanna. Linda Burke was Meyer's Assistant Human Resources Manager. Mike Kraft was employed as Plant Manager for Meyer's during the relevant period prior to November 1, 2004. Michael Nelson served as Plant Manager for Meyer's after November 1, 2004 and until Southern began operation of the Hope, Arkansas facility on March 28, 2005.

After Southern began the operation of the Hope, Arkansas facility on March 28, 2005, Ledbetter became Vice President for Operations and Burke became the Human Resource Manager. Michael Nelson became Southern's Plant Manager.

B. Meyer's Discipline of Michael W. Chamlee

1. Chamlee's August 20, 2004 Discipline

a. Evidence Presented by the Parties

Chamlee was employed by Meyer's for approximately ten and a half years. Chamlee worked in maintenance and served as a shop steward for the last three to four years of his employment. As part of his duties as steward, Chamlee interpreted the collective bargaining agreement and represented employees in the grievance procedure of the collective bargaining agreement. Chamlee estimated that he filed approximately two to three grievances each month. He also served on the bargaining committee for the July 2004 negotiations between Meyer's and Teamsters Local 878. Human Resources Vice President Rick Ledbetter, herein Ledbetter, testified that Chamlee was very direct and outspoken and probably filed more grievances than other stewards. He recalled that Chamlee was also regarded as outspoken during contract negotiations. Maintenance Manager B. J. Turner also acknowledged that Chamlee was an active steward in filing grievances. Teamsters Local 878 Vice President Carlton Collins testified that on occasion Chamlee spoke in a raised voice and became upset during grievance meetings. Collins explained that Chamlee became emotional because he was adamant about wanting the company to follow the collective bargaining agreement. Collins denied, however, that he ever observed Chamlee as violent or threatening in any way.

During the 2004 contract negotiations, there were discussions about bargaining unit employees' temporary assignments to salaried positions. Chamlee testified that there had been occasions when bargaining unit employee were selected to fill in for supervisors during absences for vacation or illness. Because employees were uncomfortable with the dual roles, Teamsters Local 878 proposed a clause limiting a bargaining unit employee's substitution as a supervisor to only once during

a six-month period. The Union proposed that if the employee left the bargaining unit to temporarily fill a supervisory position more than once during a six-month period, the employee lost his seniority and his day shift bid job. Meyer's accepted the proposal.

In mid-August 2004, Chamlee discovered that bargaining unit employee Kenneth Givens was substituting for Maintenance Shift Supervisor Jimmy Ayers. On August 19, 2004, Chamlee went to the office of Maintenance Manager and Chief Engineer Richard Stewart, herein Stewart. Chamlee told Stewart that Givens' temporary assignment to the supervisory position would jeopardize his bargaining unit seniority and his day shift bid job. Stewart did not agree with Chamlee's interpretation of the new contract provision. Chamlee and Stewart argued about the interpretation of the contract provision for approximately 10 to 15 minutes and their voices became raised. Chamlee recalled that both he and Stewart used the word "damn" in reference to the contract. Chamlee denied calling Stewart any names or referring to him in any derogatory manner. Chamlee denied that he refused any directive or made any threat to Stewart during the conversation. Chamlee testified that when he decided that the discussion was not productive, he left the office, closing the door "rather hard." After leaving the office, Chamlee looked back through Stewart's glass door and saw Stewart walking toward the door. Chamlee returned to the office and asked Stewart if he had anything else to say to him. Stewart told him that he was tired of Chamlee's attitude toward management and the way that he was "handling" his position as a union steward. Stewart added that he was not going to stand for it and that he planned to give Chamlee a "write-up."

Later that same morning Chamlee not only spoke with Givens about the possible risk to his seniority, he also spoke with Ledbetter about his concerns about the application of the contract provision. While he was in Ledbetter's office, Plant Manager Mike Kraft joined the discussion. Chamlee repeated the same concerns to Ledbetter and to Kraft that he had shared with Stewart. Both Ledbetter and Kraft interpreted the contract similarly to Stewart. During the time that Chamlee was speaking with Ledbetter and Kraft, Stewart joined the discussion. While Chamlee again repeated his concerns, all three managers repeated their opposing interpretation of the contract. Before Chamlee left the office, however, Stewart again told Chamlee that he didn't like the way that Chamlee was handling his job as union steward and he didn't like Chamlee's attitude toward management. Kraft added that he also did not like Chamlee's attitude and that he had previously heard Chamlee's arguments with members of management concerning "union situations." Chamlee testified: "And that he told me that he didn't care whether I was a damn union steward or not but the next time he was going to fire my ass." Chamlee also testified that Kraft said something about "how he had reached his level in management." Chamlee admitted that he responded: "Mr. Kraft, you'll never reach my level." Stewart again stated that he was going to discipline Chamlee.

On August 20, 2004, Chamlee received an Employee Warning Notice. The notice included the following language: "Michael has a problem maintaining his temper with management. Inappropriate behavior such as screaming, slamming

doors, and cursing will not be tolerated in the work place towards management."

Representatives of Meyer's and Teamsters Local 878 met on February 3, 2005 to discuss discipline that had been issued to two employees. Counsel for the General Counsel offered into evidence a February 7, 2005, memorandum from Ledbetter to Burke concerning the meeting. While Burke could not recall the meeting, she acknowledged that because of the memorandum, she must have attended and taken notes. In the February 7, 2005, memorandum, Ledbetter reminded Burke to change the employees' written warnings to verbal warnings as a result of the February 3 meeting. He further added: "Also, please check your notes from the meeting and make sure you have Chamlee admitting 'I understand I have an attitude.'"

b. Factual and Legal Conclusions

The August 20, 2005, Employee Warning Notice given to Chamlee lists his inappropriate behavior as "screaming, slamming doors, and cursing." There is no dispute that Chamlee's August 2005 discipline resulted from his behavior arising out of a discussion with management concerning a potential contractual violation.

The record reflects that Chamlee filed as many or more grievances as any other steward and had a reputation for exuberance and passion in asserting employee rights under the contract. Ledbetter testified that Chamlee sometimes cursed and became excited during his meetings with management. Neither Chamlee nor the Union denies that Chamlee has raised his voice and cursed in grievance meetings.

The Board has long held that processing and presenting grievances is concerted activity protected by Section 8(a)(1) and (3) of the Act. *Bowman Transportation, Inc*., 134 NLRB 1419 (1961). Additionally, the presentation of a grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure. *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1033 (1976). Thus, it is well established that union stewards and representatives are protected by the Act when presenting grievances to an employer. *The Union Fork and Hoe Company*, 241 NLRB 907, 908 (1979). For an employee to forfeit the protection of the Act while processing a grievance or engaging in protected concerted activity, the employee's behavior must be so violent, or of such an obnoxious character, as to render the employee wholly unfit for further service. *Clara Barton Terrace Convalescent Center* at 1034.

The Board has long held that "a line exists beyond which employees may not with go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of

such a character as to render the employee unfit for further service." *Prescott Industrial Products Company*, 205 NLRB 51, 51-52 (1973). In essence, the Board allows a certain degree of leeway in terms of the way employees conduct themselves in the context of concerted protected activity. While flagrant, opprobrious conduct may be sufficient to cause an employee's concerted activity to lose the protection of the Act, "impropriety alone does not strip concerted conduct of statutory protection." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1985), enfd. denied in part, 81 F.3d 209 (D.C. Cir. 1996).

Ledbetter asserted that Stewart previously warned Chamlee to refrain from cursing and "being aggressive in the workplace." He defined "aggressive" as Chamlee's getting "into people's personal space." Stewart, however, did not testify and Ledbetter did not produce any prior discipline for Chamlee. Chamlee testified that while Stewart had commented on his prior outbursts, Stewart had never disciplined him. While Ledbetter asserted that he had heard Chamlee use profanity with Management, he conceded that it had always been in the context of a grievance meeting or negotiation session.

In *Atlantic Steel Co*., 245 NLRB 814 (1979), the Board articulated the factors to be balanced in determining whether an employee's protected concerted activity loses the protection of the Act due to opprobrious conduct. The factors are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by unfair labor practices. Clearly, the conduct in issue occurred during the course of discussions about the interpretation of the collective bargaining agreement and within the confines of management offices. There is no evidence that Chamlee's alleged outburst interrupted the work process or was even overheard by bargaining unit employees. While there is no evidence that Chamlee's conduct was provoked by the employer's unfair labor practice, the conduct was in response to what Chamlee perceived to be a potential contract violation.

Based upon the overall evidence, it does not appear that Chamlee exceeded the bounds of lawful conduct in his interchange with management on August 20. Undeniably, he used a loud voice and perhaps inappropriately slammed Stewart's door. There is no evidence, however, that Chamlee personally directed any profanity or derogatory statements toward Stewart, Ledbetter, or any other Meyer's management official. Much more offensive and disruptive behavior by an employee has failed to lose the protection of the Act. In *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965), the Court affirmed the Board's finding that an employer violated the Act when it discharged a grievance committeemen who, during the course of a grievance meeting, called the employer's representative a "horse's ass."

The evidence as a whole demonstrates that Meyer's discipline to Chamlee was motivated by Chamlee's protected concerted activity. As the Board explained in a recent decision involving an employee's discipline for allegedly engaging in protected concerted activity, the appropriate analysis is whether the conduct was protected under the Act, and if so, whether the employee lost the protection at any

point. *Noble Metal Processing, Inc*., 346 NLRB No. 78, slip op. at 1 (2006). Inasmuch as Chamlee was engaged in protected concerted activity and finding that he did not lose the protection of the Act, I find that his August warning was violative of Section 8(a)(1) and (3) of the Act.

Because Meyer's motivation is not issue, an analysis under *Wright Line*[2] is not appropriate. Were it appropriate however, I would also find that Counsel for the General Counsel has made a *prima facie* showing sufficient to support the inference that Chamlee's protected conduct was a "motivating factor" in Meyer's decision to discipline Chamlee. Meyer's General Plant Rules provided that an employee could be terminated for "fighting, threatening injury, provoking, or intimidating another person." The rules also provided for discipline for behavior that is disruptive or offensive to others. Inasmuch as there is no evidence of how or when these rules were applied to other employees, there is no way to ascertain Meyer's uniformity of discipline. Accordingly, even under a *Wright Line* analysis, the evidence does not support a finding that Chamlee would have been disciplined in the absence of his protected conduct.

2. Chamlee's March 17, 2005 Discipline

a. Evidence Presented by the Parties

Chamlee testified that prior to his receiving a second disciplinary warning on March 17, 2005, there were discussions among employees about Meyer's financial difficulties and its bankruptcy filing. He recalled that he had heard that if a purchaser did not buy the Meyer's facility through a bid process, all of the employees would lose their jobs by the end of March. He asserted that because employees were not able to take their scheduled vacations, employees became concerned about losing their earned vacation benefits as well as their retirement.

On February 19, 2005, Chamlee telephoned Meyer's Benefits Manager Betty Steele at her home at approximately 9:30 p.m. Chamlee testified that he telephoned Steele to inquire about the security of the employees' retirement fund. Steel assured him that the retirement was secure. Steele recalled that she told him that his retirement and everyone's retirement was "fine" and for him not to worry about it. Chamlee testified that prior to calling Steele, he had spoken with an agent of the FBI because he had felt that if a corporation could lose millions of dollars, there might be some kind of impropriety. He told Steele about his contact with the FBI. He asked her if she knew of anything that might be illegal activity by management. She assured him that she knew of no improprieties.

Steele explained that prior to Chamlee's telephone call; she received calls from other employees after working hours. She recalled that several employees had

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2 *Wright Line*, 251 NLRB 1083, 1088, fn. 11 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

questions concerning their retirement and COBRA. She added that during this time of changeover for the facility, the entire town had been in a stir and during this period she received calls "all the time" concerning such matters. She was unaware of any policy that prohibited employees from contacting supervisors or managers at home.

The next morning, Steele mentioned Chamlee's telephone call to Sue Saladin; Meyer's Payroll Manager. Saladin reminded Steel of Ledbetter's previous admonition to notify management of any derogatory comments made about management. Saladin warned that if Steele did not inform Ledbetter of the telephone call, she might lose her job. In a memorandum to Ledbetter dated February 22, 2005, Steele outlined the details of her telephone call. Steele included in the memorandum Chamlee's comments about having contacted the FBI. She included in the memorandum: "If indeed the FBI has been notified, I felt you should be prepared for the visit." Steele also added that Chamlee told her that he was sorry for calling her at home but she had been the only person he trusted in the front office and he wanted to ask her some questions. She did not indicate that Chamlee's telephone call was frightening or threatening in any way.

Chamlee recalled that a day or two after his telephone call to Steele, he was called to Ledbetter's office to meet with Ledbetter and Plant Manager Michael E. Nelson. Ledbetter asked Chamlee if he had telephoned Steele and Chamlee acknowledged that he had. Ledbetter told him that it was against company policy for a union steward to call a member of management at home to discuss potential union business. Chamlee testified that he responded by asking Ledbetter to show him the plant rule that prohibited telephoning a member of management at home. Neither Southern nor Meyer's presented any evidence of a rule prohibiting such a telephone call to a manager's home. Additionally, Burke testified that she was unaware of any Meyer's policy prohibiting employees from contacting supervisors at home.

On March 17, 2005, Chamlee was issued a written warning. The disciplinary form indicates that Chamlee received the second written warning for violation of Rule #5 in the "Group A" offense category. The Facility Rules and Disciplinary Procedures in effect at that time identified Rule #5 in a "Group A" offense as: "Violation of the Company's policy on harassment, including fighting, providing a fight, intimidation, use of threatening or profane language, or otherwise creating a hostile or unpleasant work environment." The attached memorandum to Chamlee's file indicates that the warning was given for "Harassment - After Business Hours Telephone Call to a Manager's Home." The memorandum described the discussion during the disciplinary interview with Chamlee. The memorandum documented that Ledbetter told Chamlee that while it was within Chamlee's role as a union steward to question anything applicable to business, he was required to follow proper channels and required to conduct business during "normal business hours." Ledbetter explained to Chamlee that he must not telephone members of management at home and/or outside business hours concerning "such matters." Chamlee was told that he could contact his immediate supervisor or the Plant Manager if the subject matter related to immediate needs of the job or the operation of the facility.

Ledbetter testified that he was involved in the decision to give Chamlee the March 2005 warning and that the discipline was based upon Chamlee's telephone call to Steele. He maintained that Steele told him that she had been upset by Chamlee's calling her in the middle of the night. Steele testified, however, that when she spoke with Ledbetter about the telephone call, she did not tell him that she had felt harassed or intimidated by Chamlee's telephone call and she had not indicated that she had been upset by the telephone call.

b. Factual and Legal Conclusions

The March 1, 2005 memorandum to Chamlee's personnel file documents the basis for Chamlee's discipline as harassment in telephoning a member of management after business hours. The content of the memorandum, however, reflects that Chamlee was counseled concerning the proper channels and time frame for conducting union business. As discussed above, where violations turn on an employer's motivation, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under that analysis, the General Counsel must make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. *Golden State Foods Corp*., 340 NLRB 382, 385 (2003). If General Counsel makes the required initial showing, the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employee's union activity. *Manno Electric,* 321 NLRB 278, 280 (1996). Based upon the testimony of both Chamlee and Steele, it is apparent that the substance of the telephone conversation dealt with how Meyer's financial situation would affect employee pension benefits. Accordingly, Chamlee's call related to personnel concerns on behalf of all Meyer's employees and constituted protected concerted activity within the classic sense.[3]

In *Consumers Power Co*., 282 NLRB 130, 132 (1986), the Board observed that where an employee is disciplined for conduct that is part of the "res gestae of protected activity," the relevant question becomes whether the conduct is so egregious to remove it from the protection of the Act, or of such a character as to render the employee unfit for service. As discussed more fully below, neither the testimony of Steele nor any other witness supports a finding that Chamlee's conduct was of such an egregious nature as to render Chamlee unfit for service. In fact I note that the disciplinary action notice specifically includes a hand-written conclusion that the circumstances do not warrant termination. Accordingly, there is insufficient evidence that Chamlee's conduct lost the protection of the Act.

[3] The conduct of a single employee may rise to protected concerted activity where the employee acts on behalf of fellow employees in regard to conditions of employment. *Guardian Industries Corp*., 319 NLRB 542, 549 (1995).

The evidence reflects, therefore, that Chamlee was engaged in protected conduct and there is no dispute as to employer knowledge. While there is no direct evidence of animus, such animus may be inferred. The Board has noted that because there is seldom direct evidence of unlawful motivation, such motivation may be inferred from the totality of the circumstances. *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

Rule 5 of Meyer's Facility Rules and Disciplinary Procedures is cited as the basis for Chamlee's March 2005 warning. The rule provides for discipline in the event of a violation of the company's policy on harassment, including fighting, provoking a fight, intimidation, use of threatening or profane language, or otherwise creating a hostile or unpleasant work environment. In relying upon this work rule, Meyer's relied solely upon Chamlee's single telephone conversation with Steele. In her sworn testimony, Steele indicates that she reported her conversation with Chamlee only because she was urged to do so by Payroll Manager Sue Saladin. Saladin cautioned Steele that if she did not report the conversation to Ledbetter, she might be at risk for discharge. Steele testified without hesitation that when she personally spoke with Ledbetter, she did not tell him that she felt harassed or intimidated by Chamlee's call or indicate that she was upset by the call. Steele testified that she neither recommended nor requested discipline for Chamlee. I found Steele to be a totally credible witness. While Steele confirmed that she was not offered a job by Southern, there is no evidence of bias toward Meyer's and I find no basis to discredit her testimony. Additionally, I note that the warning was presented to Chamlee on March 17, 2005. The memorandum to the file is dated March 1, 2005 and the incident upon which it is based occurred on February 19, 2005. Thus, the discipline was issued only seven days before Southern opened the application process for hiring Meyer's employees. Certainly Chamlee already had a warning in his file that would have met Southern's elimination criteria. It is rather suspicious, however, that Meyer's added yet another warning to Chamlee's record at that particular time and based it upon an incident occurring more than a month earlier. In her post-hearing brief, Counsel for the General Counsel points out that Ledbetter's involvement in the discipline as well as the timing of the discipline supports a finding of unlawful motivation. The evidence reflects that as Meyer's Vice President of Human Resources, Ledbetter was more often involved in reviewing or endorsing discipline given by lower level supervisors and managers. With respect to Chamlee's March warning, however, Ledbetter conducted the disciplinary interview with Chamlee and was instrumental in the issuance of the discipline. As discussed more fully in another section of this decision, it was during this same time period that he was engaged in ongoing discussions with Harlan Bakeries (Southern) concerning the purchase of the facility. The disciplinary action form is dated seven days before Chamlee submitted his application for employment with Southern. Certainly the parties were mindful of the fact that if Southern hired a majority of the Meyer's employees, a bargaining obligation would attach. It was therefore, arguably advantageous to both Meyer's and Southern that the transition occur without Southern's requirement to hire an admittedly outspoken and aggressive steward.

Ledbetter asserts that Chamlee was disciplined for violating a company policy

against contacting managers at home. Other than Ledbetter's assertion, there is no record evidence that such a policy existed. There is no mention in Meyer's facility rules and disciplinary procedures of such a rule. Additionally, both Steele and Burke testified that they were not aware of such policy.

Based upon Steele's credited testimony and the record evidence as a whole, the reasons advanced for Chamlee's discipline appear to be false and without foundation. When a respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp*., 362 F.2d 466, 470 (9th Cir. 1966); *Limestock Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Additionally, the Board has found that a finding of pretext defeats any attempt by a respondent to show that it would have taken the same action against the employee absent his protected activity. *Syracuse Scenery & Stage Lighting Co., Inc*., 342 NLRB No. 65, slip op. at 8 (2004). Accordingly, I find that Meyer's violated Section 8(a)(3) and (1) of the Act by issuing the March 17, 2005, warning to Chamlee.

3. 8(a)(1) Allegations Involving Chamlee

a. Complaint Allegations and Evidence Presented

Counsel for the General Counsel alleges that Stewart threatened Chamlee on or about August 18 or 19, 2004 with discipline and an unspecified reprisal because he engaged in union and other protected activity. Counsel for the General Counsel also alleges that Kraft threatened Chamlee on or about August 18 or 19, 2004 with discharge because he engaged in union and other protected activity. As discussed above, Chamlee testified concerning his August 2005 conversations with both Stewart and Kraft concerning contract provision. Neither Stewart nor Kraft testified in the hearing. Accordingly, Chamlee's testimony remains unrebutted concerning these alleged 8(a)(1) violations.

b. Factual and Legal Conclusions

It is apparent that Chamlee continued to assert his concerns about a potential contract violation in the face of disagreement by three management officials. Despite the fact that his concerns did not find favor with the managers, he relentlessly persevered. The fact that both alleged threats occurred in the context of this pursuit does not diminish the coercive nature of the statements. The Board has found that threats of job loss violate 8(a)(1) "because these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce." *Clinton Electronics Corp*., 332 NLRB 479 (2000). See also *Central Transport v. NLRB*, 997 F.2d 1180, 1191 (7th Cir. 1993).

Both statements alleged as 8(a)(1) violations arise during the course of Chamlee's conversations with Stewart and Kraft concerning a potential contract violation. Both unrebutted threats relate to how Chamlee conducted himself as a union steward. Although Ledbetter recalled meeting with Chamlee in his office, he

did not have a recollection as to the substance of the discussion. He did not deny the threats Chamlee attributed to Stewart and Kraft during the discussion in Ledbetter's office. As discussed above, I do not find that Chamlee's conduct in these discussions with management officials was of such an egregious nature to take it outside the protection of the Act. Accordingly, I find, that the threats of discipline made by Stewart and Kraft constitute coercion and restraint in violation of Section 8(a)(1). *Cleveland Pneumatic Co*., 271 NLRB 425 (1984).

C. Harlan Bakeries Interest in Purchasing Meyer's

During the last three years of its operation, Meyer's experienced increasing financial difficulties. Beginning in early 2004, Meyer's began to actively market the bakery for sale. Ledbetter was instructed to assist in the marketing of the business to prospective buyers.

Hugh Harlan is the President of Harlan Bakeries in Avon, Indiana. Hal Harlan and Doug Harlan serve as Executive Vice-Presidents for Harlan Bakeries and Paul Hayden has been employed as the Chief Financial Officer for Harlan Bakeries since 1997. Hayden testified that for four to five years prior to 2005, Harlan Bakeries had been aware that Meyer's was for sale. In November 2004, however, Meyer's President Hanna specifically contacted Harlan Bakeries about purchasing the Hope, Arkansas facility.

When Hayden and other Harlan representatives toured the Meyer's facility in November 2004, Meyer's presented an overview of the company and specifically cited potential areas of change for the company's financial recovery. Hayden recalled that the areas related to savings in employee benefits and wages as well as cost reductions in sales staff, operations, and administration. From November 2004 until approximately February 6th or 7th, Harlan Bakeries conducted a due diligence purchase assessment and Hayden maintained ongoing contact with Ledbetter and other Meyer's officials concerning Harlan Bakeries' purchase of Meyer's.

Hayden testified that because Meyer's had not conducted a financial statement audit, the due diligence period was required to review Meyer's financial situation and to evaluate the validity of Meyer's "business turnaround strategy." While Hayden requested information from Meyer's, he revised the strategic turnaround plan without Meyer's input concerning implementation. Hayden testified that during the due diligence period, Harlan Bakeries determined that Meyer's was operating at a loss of close to $13 million a year.

When Hayden first visited the Hope facility in November, 2004, Ledbetter offered suggestions as to how Meyer's could cut costs by meeting with the unions to obtain concessions and reductions in the collective bargaining agreements. There were discussions about modifications of the collective bargaining agreements as a pre-requisite to reaching an asset purchase agreement. In a letter dated December 14, 2004, Ledbetter outlined a projection of how costs could be reduced with bankruptcy and without bankruptcy. The letter and summary also included an

excerpt from a law review article discussing a Supreme Court case and a debtor's rejection of a collective bargaining agreement. After additional discussion with Meyer's representatives, Harlan Bakeries asked Ledbetter to put together a summary of what he believed that he could accomplish if he were to negotiate with each union. In Ledbetter's response, he stated that Meyer's could ask for collective bargaining agreement amendments in wages, rules, benefits, and fringes. Ledbetter's summary set forth the specific savings that would be obtained by changes in work rules and reduction in wages and benefits. In summary, the total savings from all of the proposed concessions and contract modifications was projected at only $2,316,000.00. Hayden testified that while this sounded like a great deal of money, it was not going to be a sufficient cut in costs for a company that was losing 12 and 13 million dollars each year.

Hayden recalled that Harlan Bakeries reviewed every section of Meyer's operation to find cost reductions. In addition to the labor costs, the analysis included a review of sales as well as customer reduction and a product offering reduction. During the course of the review, Harlan Bakeries determined that rather than having Meyer's negotiate new collective bargaining agreements with the unions, all employees would be hired under the terms and conditions of employment set by the new company. Following the period of due diligence, Harlan Bakeries established Southern for the sole purpose of purchasing Meyer's assets.

D. Meyer's Bankruptcy

On or about February 7, 2005 Meyer's filed for Chapter 11 bankruptcy protection under Section 363 of the Bankruptcy Code. A copy of the Asset Purchase Agreement was attached to the petition. Upon approval by the Bankruptcy Court, the bankruptcy petition provided for the transfer of assets to Southern "free and clear" of all liens, encumbrances, and interests. On or about the same day, Ledbetter notified representatives of both BCTGM Local 111 and Teamsters Local 878 of the bankruptcy filing. Meyer's and Southern anticipated that the bankruptcy process would take approximately 60 days. Hayden testified that the bankruptcy petition was filed on Super Bowl Sunday because the credit source for the facility set February 6, 2005 as the deadline for signing the asset purchase agreement in order to avoid Chapter 7 bankruptcy. Ledbetter testified that in late February or early March, he also met with representatives of the unions to discuss the bankruptcy and the potential sale of the facility.

Ledbetter held meetings on February 7 to inform employees of the bankruptcy filing and the potential purchase of assets by the Harlan Group. Ledbetter recalled that when he met with employee groups, employees asked what would happen if there was no buyer for the facility. Ledbetter testified that he told employees that if there was no buyer, the facility would close. Ledbetter also told employees that the Harlan Group did not have unions at their other facilities. Ledbetter explained to the employees that the purchase provision of the bankruptcy petition provided that the purchaser would not assume Meyer's liabilities and would not adopt Meyer's contracts including the collective bargaining agreements. Ledbetter testified that he

also told employees that if the new owner hired more than 50% of the employees, the new owner would have an obligation to sit down and bargain with the unions.

During the period pending the decision of the bankruptcy court, Hal Harlan also attended meetings with the Meyer's employees. Ledbetter recalled that employees asked Harlan about the presence of unions at Harlan's other facilities. Harlan explained that he didn't feel that third parties were necessary and that he preferred to deal directly with his employees. Ledbetter recalled that during some of the meetings, Harlan also told employees that he would respect employees' freedom to join unions and he would sit down and bargain with the union if the "people elected to be represented by the union."

On March 17, 2005, the United States Bankruptcy Judge approved the Purchase Asset Agreement, herein APA, between Meyer's and Southern for the acquisition of the Hope, Arkansas facility. The Order provided that except for liabilities expressly assumed under the APA, Southern would not be liable for any liens or claims against Meyer's and Southern would have no successor or vicarious liability of any kind or character with respect to Meyer's. Section 2.2 of the APA specifically confirmed that the collective bargaining agreements with Teamsters Local 878 and BCTGM Local 111 were excluded from the transaction. Hayden testified that the Court's approval of the APA was conditioned upon the completion of all agreement terms within a 10-day period. Upon the Court's Order, Southern was to assume ownership of the assets and control of the facility on March 28, 2005.

E. Southern's Acquisition of the Meyer's Facility

After the Bankruptcy Court approved the APA, Southern had 10 days in which to staff its bakery and prepare for operating the bakery. Hayden testified that it was Southern's initial position to offer every Meyer's employee an opportunity to apply for employment. Southern also decided, however, to downsize the work force and eliminate 50 to 75 production jobs. Based upon Hayden's recommendation, the Southern Executive Committee established hiring criteria for Meyer's employees on or about March 20, 2005. The criteria evaluated employees with respect to drug usage, safety, discipline, and attendance. Because Southern wanted a drug-free work force, everyone was required to undergo drug testing. In order to have a safe work force, Southern determined that any individual who had any accidents during the prior 12-month period was not eligible for employment. Any employee with a written disciplinary action or greater during the prior 12-month period was not eligible for employment. An employee with five or more unexcused absences during the prior 12-month period was not eligible.

F. The Application Process for Meyer's Employees

On March 24, Southern representatives began meetings with Meyer's employees concerning application for employment. Southern used the Harlan Bakeries application form and inserted the Southern logo. A questionnaire covering the employment criteria was attached to the application form. Hayden spoke with

employees and explained his background and affiliation with the Harlan family. Hal Harlan was present at the meetings and told employees that everyone from Meyer's would have an opportunity to apply for a position with Southern. Hayden recalled that Harlan told employees that he would offer everyone at Meyer's an opportunity to apply for positions at Southern under Southern's terms and conditions of employment.

Hayden recalled that during the March 24, 2005, meetings with employees, Harlan explained the purchase transaction. He told employees that Southern was purchasing Meyer's assets. Harlan explained that Southern was not assuming any liabilities and very few contracts. He explained that Southern would not assume the existing collective bargaining agreements. Southern's wage scale and the Benefit Plan Summary were distributed to employees. The summary included the insurance plans for medical, dental, life, accidental death, and dismemberment. The summary also dealt with the short-term and long-term disability plans as well as the retirement and savings plan. The summary's reference to the holiday and vacation plans outlined the annual holidays and the vacation weeks as allowed by seniority. Hayden recalled that employees were told that the employee handbook had not been finalized at that point and would be provided at a later time.

During the meeting, employees asked Harlan if there were unions at any of his other bakeries or businesses. He told employees that he did not have any other businesses where employees were represented by a third party. He explained that he liked to work with his employees directly and he didn't feel that it was necessary for them to be represented by a third party. Hayden also recalled that Harlan told employees that if they chose to be represented by a third party, he would respect their wishes and deal with the third party.

Hayden recalled that employees were told that they would be paid straight time for working holidays and overtime would be based upon working in excess of 40 hours rather than over 8 hours. Hayden also recalled that a maintenance employee asked about the possibility of changing the maintenance work schedule that would allow maintenance employees to have occasional time off on weekends. Harlan responded that he would be open to looking at the schedule to make it more accommodating for employees, conditioned upon there being an adequate workforce available to do the proper preventive maintenance and to keep the production lines operational. Hayden did not recall any discussion with respect to premium pay for Sundays, the job bidding procedure, or whether employees would be allowed personal days off. Harlan told employees that he would honor their years of service for determining the amount of vacation to which they would be entitled. Burke attended meetings with employees on March 24 and March 28. She recalled that she was in and out of the meetings and had not been present during the entire meetings. She did not recall any discussions during the meetings concerning union bulletin boards, overtime pay, Sunday premium pay, double pay for working seven consecutive days, reductions in holiday pay, or the job bidding procedure.

Employees were told that they were to complete the application on March 24th

or March 25th and they would be contacted over the weekend if they were to be given a "new hire" package. Approximately two days prior to the March 24 meeting with employees, Hayden asked Ledbetter to compile a list of anyone who had failed the attendance, safety, or disciplinary criteria. Meyer's Assistant Human Resources Manager; Linda Burke, was directed to compile the information for Hayden. Burke explained that she retrieved the information from their Human Resource Information System or HRIS system by keying in the dates and the request for written warnings. Based upon her query, the computer system generated a list of employees receiving written warnings from March 28, 2004 to March 28, 2005. Burke explained that she normally input the issuance of written warnings into the computer system within a week or two of the issuance. Burke testified that when she generated the list, she had not known its purpose and had not been informed of the hiring criteria to be used by Southern. Burke also testified that when she generated the list for Ledbetter, she made no independent search for employees with warnings during the specific time period.

On either March 24 or 25, Hayden received the list of 17 employees who had received a written warning or greater discipline during the previous 12 months. One employee was identified as failing the safety criteria and no employees failed the attendance criteria. Upon receiving the information from Ledbetter, Hayden told Ledbetter that Southern would not hire any employees who did not meet the hiring criteria. As of March 21, 2005, Meyer's employed 387 employees. On or about March 28, 2005, Southern hired 319 of the Meyer's employees. Approximately 12 to 14 of Meyer's salaried employees were not hired by Southern.

Southern conducted meetings with the employees who met the hiring criteria on March 28, 2005. The employees were given "new-hire" packages that included a copy of Facility Rules and Disciplinary Procedures. Employees were told that they would later receive a copy of the Employee Handbook that contained normal business rules. Employees were also given a copy of the wage rates that were designated as "Plant Wages Revised March 28, 2005." There is no dispute that the wage rate schedule and classifications were different than those existing prior to March 28, 2005.

Ledbetter testified that the Employee Handbook that was later distributed to employees memorialized the policies that were effective when Southern initiated operations. He could not recall the specific date in which the Handbook was distributed, however he believed it to be sometime in May. A copy of the Handbook was distributed with employee paychecks.

G. Whether Southern Failed to Hire Chamlee in Violation of 8(a)(3)

Southern maintains that because Chamlee's name was included on the list of employees having received a written warning during the previous 12 months, he was not offered employment with Southern. In paragraph 15 and 16 of the consolidated complaint, General Counsel alleges that Southern unlawfully refused to hire Chamlee. In argument, Counsel for the General Counsel maintains that because

Meyer's unlawfully disciplined Chamlee in August 2004 and March 2005, Chamlee was unlawfully precluded from employment with Southern.

There are three necessary elements that General Counsel must prove in order to establish an unlawful refusal to hire (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire; and (3) antiunion animus contributed to the decision not to hire the applicant. *FES,* 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). With respect to the first and second requirements of FES, It is undisputed that Southern was hiring. There is no evidence that Chamlee lacked the experience and training to perform the job. Moreover, Maintenance Manager Turner described Chamlee as one of his better employees.

As evidence of animus in hiring, General Counsel presented the testimony of sanitation employee Charlene Moore. Moore explained that while she was employed by Meyer's, she cleaned the office of George Hainey. Although she could not provide his title, she asserted that he was a member of Meyer's management. No evidence was offered to the contrary. During the sixty-day period following Meyer's bankruptcy filing, she spoke with Hainey about the possibility of her employment with Southern. He told her that he did not believe that she had anything to worry about because only the employees who failed the drug test, had excessive attendance "trouble," or were "trouble makers" would not be hired. Moore estimated that the conversation occurred toward the end of February 2005. Moore also recalled having a conversation with Supervisor Jesse Terrell about her chances for employment. Moore testified that Terrell told her that department superintendents were being asked to identify the employees they "didn't believe" would be rehired. Moore also testified that she had a conversation with a Department Manager Mike Summerson about whether department managers were asked to provide a list. Summerson responded: "What list."

Neither Hainey nor Terrell were presented to rebut Moore's testimony about the alleged list or identification of "trouble makers." Even crediting Moore's unrebutted testimony however, I do not find her testimony sufficient evidence of animus to support a finding that Southern's failure to hire Chamlee was unlawfully motivated.[4]

In determining whether the General Counsel has met the initial burden of proving an employer's protected activity was a motivating factor in an employer's decision to take an adverse action against an employee, the Board has held that the motive may be inferred from the total circumstances proved. Under certain

[4] Even if Terrell or Hainey used the term "trouble maker," neither Moore nor any other witness alleges that there was any reference to Chamlee or to either union. Additionally, there is no question that employees with disciplinary warnings during the previous 12 months were included on a "list" for elimination for consideration for employment. Neither the General Counsel nor the charging parties allege such criteria to be unlawfully motivated.

circumstances, the finding of animus may be inferred from the record as a whole, even in the absence of direct evidence. *Fluor Daniel, Inc*., 304 NLRB 970 (1991), enfd. 976 F. 2d 744 (11th Cir. 1992). Counsel for the General Counsel argues that in light of Southern's admitted opposition to unionization and Ledbetter's hostility toward Chamlee, "it would be naïve to assume that antiunion animus did not bear on Southern's decision not to hire Chamlee." I agree that the total record evidence supports such a finding of animus.

As discussed above, the timing[5] of Meyer's decision to issue Chamlee a second warning only days before Southern began the hiring process warrants an inference of animus. Although there is no evidence that Ledbetter was involved in developing the hiring criteria for Southern or had any responsibility for determining who would be offered employment by Southern, he was significantly involved in Chamlee's March 17, 2005 discipline and he was one of the principal managers working with Harlan Bakeries during the period of due diligence and the finalization of the asset sale. With the transition from Meyer's to Southern, he ascended to an elevated management position.

Finding that animus was a contributing factor in Southern's refusal to hire Chamlee, Counsel for the General Counsel has established a prima facie case and the burden shifts to Southern to show that it would not have hired Chamlee even in the absence of his union and protected activity. Southern maintains that the sole reason that Chamlee was not hired was his receipt of the written warnings within the relevant 12-month period. There is therefore, no evidence that Chamlee would not have been hired by Southern, absent Southern's reliance on Chamlee's unlawful discipline. Inasmuch as the discipline upon which Southern relies was unlawful, Southern cannot establish that it would have declined to offer Chamlee employment in the absence of his union and protected activity.

Additionally, as a matter of law, Southern must be held responsible for remedying Meyer's unfair labor practices and the basis upon which Chamlee was not hired. The Board has long held that a bona fide purchaser with knowledge of the unfair labor practices of the predecessor is responsible for remedying the unfair labor practices. *Perma Vinyl Corporation*, 164 NLRB 968 (1967). In *Perma Vinyl*, one of the factors that the Board relied upon in finding that the successor purchaser had notice of the predecessor's unfair labor practices was the fact that the president of *Perma Vinyl*, who had personally participated in *Perma Vinyl's* unfair labor practices, became the manager of the successor's plastics division, and thus his knowledge was imputed to the successor. In a later Supreme Court case, the Court held that the successor who acquires and operates a business in basically unchanged form, under circumstances that charge him with notice of an outstanding Board order against the predecessor, can be held responsible for remedying the predecessor's unlawful conduct. *Golden State Bottling Co*., 414 U.S. 168, 94 S. Ct. 414 (1973). In reaching

[5] The Board has long held that the timing of adverse employment actions may support an inference of animus. *Masland Industries, Inc*. 311 NLRB 184, 197 (1993).

its decision in *Golden State*, the Court found that nothing in its earlier decision in *NLRB v. Burns International Security Services, Inc.*[6] diminished the imposition of successor liability to remedy a predecessor's outstanding unfair labor practices. Since the court's decision in *Golden State*, the Board has also found a successor liable even in circumstances where there was no formal charge pending against the predecessor. In determining whether a successor had notice of its potential liability, the Board does not consider whether the successor has seen charges or complaints, but rather whether the successor was aware of conduct that the Board ultimately found unlawful. *Robert G. Andrew, Inc*., 300 NLRB 444 (1990). In *Golden State*, the successor's knowledge of the unfair labor practices was presumed from the fact that the predecessor's secretary and manager of the bottling business became the general manager and president of the successor company. The Court held that it was permissible to draw the inference that this individual informed his prospective employer of the litigation of the litigation before completion of the sale. *Golden State* at 173-174. It is also well settled that once the General Counsel establishes an employer's successorship status, the burden is on the successor to show that it lacked knowledge of its predecessor's unfair labor practices. *Blu-Fountain Manor*, 270 NLRB 199, 210 (1984), enfd. sub nom. *NLRB v. Jam Enterprises*, 785 F.2d 195 (8th Cir. 1986); *Am-Del-Co., Inc*., 234 NLRB 1040 (1978). In the instant case, Southern's knowledge is clearly established in the fact that Ledbetter not only had knowledge of Meyer's unlawful discipline to Chamlee, he additionally participated in the disciplinary process.

Accordingly, the evidence supports a finding that Southern discriminatorily denied employment to Chamlee and is also held jointly and severally liable for Meyer's unfair labor practices with respect to Chamlee. Southern, therefore, must offer reinstatement to Chamlee and share joint and several liability for any backpay owing prior to reinstatement.

H. Continuity of Operation the Unions; Requests to Bargain

There is no dispute that both Meyer's and Southern have operated a commercial bakery at the Hope, Arkansas facility. Southern continued the bakery operation using the same telephone number and most of the equipment and machinery that was previously used by Meyer's. Southern has continued to manufacture the same products as Meyer's and there was no hiatus between Meyer's manufacturing operation and that of Southern. There is no dispute that Southern hired a majority of Meyer's employees and that these employees are performing essentially the same work they performed for Meyer's.

On March 5, 2005, representatives for Teamsters Local 878 met with Meyer's representatives for effects bargaining. During the course of the meeting, Ledbetter received information that two of the three potential bidders for Meyer's had dropped out, leaving only Harlan Bakeries. Ledbetter explained in the meeting that only

[6] 406 U.S. 272 (1972).

Harlan wanted to purchase Meyer's assets and they would not assume the collective bargaining agreements.

On March 23, 2005, Ledbetter and Plant Manager Nelson met with representatives of BCTGM Local 111 for effects bargaining. During the meeting, Ledbetter explained the application process for employees and told the Union that the new company would begin operating the facility on March 28, 2005. Ledbetter confirmed that Southern intended to hire a majority of Meyer's employees. When the Union inquired about Southern's terms and conditions of employment, Ledbetter explained that he did not have all the details because he was still an employee of Meyer's.

By letter dated March 31, 2005, BCTGM Local 111 requested that Southern bargain with the Union concerning terms and conditions of employment. By letter date April 6, 2005, Teamsters Local 878 requested that Southern bargain with the Union to negotiate a collective bargaining agreement for the bargaining unit employees represented by Teamsters Local 878.

Southern began bargaining with the BCTGM Local 111 in the summer of 2005 and on or about October 1, 2005, Southern entered into a collective bargaining agreement with the BCTGM Local 111. On January 23, 2006, Southern entered into a collective bargaining agreement with Teamsters Local 878.

I. Southern's Alleged Refusal to Bargain

Paragraph 20 of the consolidated complaint alleges that during April and May 2005, Southern refused to meet and bargain with BCTGM Local 111 unless BCTGM Local 111 withdrew an unfair labor practice charge that had been filed with the Board.

Representatives of Southern and representatives of BCTGM Local 111 met on April 20, 2005, for an initial negotiating session. Union President Stogner recalled that the April 20, 2005 meeting lasted for approximately two hours. At the time of the meeting, the Union had already filed a charge with the Board alleging that Southern had unlawfully implemented unilateral changes. Stogner confirmed that the Union wanted Southern to maintain the Meyer's contract, however the Union had come to the meeting to lay the groundwork for a new contract. Stogner testified that during the meeting Ledbetter told the Union that the parties could not move forward with the negotiations unless the Union dropped the charges or there was a ruling from the Board. Stogner recalled that when he again spoke with Ledbetter on May 9, 2005, Ledbetter stated that he didn't feel that the scheduled May 10, 2005 bargaining session would be fruitful because there was no ruling from the Board.

Union Steward Louis Page, who attended the same bargaining session, testified that Ledbetter wanted "them" to "drop the charges before he could move on with the other business." In further testimony, Page confirmed that Ledbetter also referred to the BCTGM Local 111's desire for Southern to assume Meyer's collective

bargaining agreement. Page recalled that Ledbetter suggested that the Union could either withdraw the charge and negotiate a new collective bargaining agreement or the Union could let the Board sort out whether Southern is bound by Meyer's contract with the Union.

Ledbetter confirmed that he met for bargaining with both the BCTGM Local 111 and Teamsters Local 878 in April 2005. He did not recall that the parties exchanged any bargaining proposals during the first bargaining session. He recalled discussing the pending unfair labor practice charges with the BCTGM Local 111. He mentioned that there was an unfair labor practice charge pending in which the Union was asserting that Southern had to recognize the collective bargaining agreement between BCTGM Local 111 and Meyer's and he suggested that it might be fruitless for Southern and the Union to negotiate an additional contract. BCTGM International Representative Dale Nichols testified that as of April 20, 2005, the Union advocated that Southern was bound by Meyer's contract with the Union. At the same time, the Union was also asking Southern to bargain for a new contract with the BCTGM Local 111. Nichols acknowledged that in a later conversation on the same day, Ledbetter said something to the effect that the parties could spend time negotiating a new contract and then down the road the Board could rule that Southern is bound by the Meyer's contract.

During the April 20, 2005, session a second bargaining session was scheduled for May 10, 2005. Ledbetter admitted, however, that Southern cancelled the second meeting because he felt that it was fruitless to spend their time focusing on a new agreement when they might have to live by the old agreement. He also admitted that when he gave a sworn affidavit to the Board during the investigation of the underlying unfair labor practice charges, he stated that the May 10 negotiating meeting was cancelled because the Union would not drop the charge with the Board.

Representatives of Southern and BCTGM Local 111 later met for negotiations and reached a collective bargaining agreement on October 1, 2005. While Union Representative Dale Nichols conceded that there were several bargaining sessions between May and October, the record is silent with respect to the exact dates of bargaining. The Union does not dispute that Ledbetter explained his concerns that it might not be fruitful to bargain for a new contract when the Board might later find that Southern was bound by Meyer's contract with the Union. Despite his concerns, however, the parties proceeded to negotiate a new collective bargaining agreement. The record therefore reflects that only one bargaining session was cancelled because of Ledbetter's expressed concerns. In light of the fact that there is no evidence of any other dilatory tactics or attempts to delay bargaining, it appears that Ledbetter's cancellation of the one bargaining session had a *de minimis* impact upon the overall bargaining and did not significantly preclude effective bargaining. Accordingly, I do not find that Southern refused to meet and bargain with BCTGM local 111 as alleged in the complaint.

J. Southern's Alleged Unilateral Changes

The consolidated complaint alleges that Teamsters Local 878 and BCTGM Local 111 have been the exclusive collective bargaining representatives for the production and sanitation employees and shipping, receiving and maintenance employees, respectively, since March 28, 2005. Counsel for the General Counsel maintains that in April, May, and June 2005, Southern implemented changes in terms and conditions of employment without notice to BCTGM Local 111 and Teamsters 878 and without affording the Unions an opportunity to bargain with respect to the conduct and the effects of the conduct.

An analysis of the prevailing law with respect to successorship begins with the Supreme Court's landmark decision in *NLRB v. Burns International Security Services, Inc*., 406 U.S. 272 (1972), where the court set out the criteria for determining whether a new employer is the successor to the prior employing entity. In *Burns*, the Court found that where the bargaining unit remained unchanged and a majority of the employees hired by the new employer was represented by a certified bargaining agent, the Board correctly required the new employer to bargain with the union. In finding a "substantial continuity" between the two enterprises, such factors as: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 43 (1987). In the present case, Southern's operation essentially satisfies all the factors necessary to establish a *Burns* successorship. Meyer's ceased operation on March 27, 2005. On March 28, 2005, Southern began the identical operation at the same location, using the same equipment, machinery and telephone. Southern's workforce was comprised entirely of a majority of unit employees who had been members of Meyer's bargaining units.

The Court in *Burns*, however, noted that while successor employers may be bound to recognize and bargain with the incumbent union, they are not bound by the substantive provisions of a collective bargaining agreement negotiated by their predecessors, but not agreed to or assumed by them. *Id* at 284. The Court noted: "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and the nature of supervision." The Court reasoned that "saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract" may make changes impossible and may discourage and inhibit the transfer of capital. *Id*. at 288.

While the Supreme Court in *Burns* provided that ordinarily a successor employer is free to set its own initial terms and conditions of employment, the Court also distinguished some exceptions that would restrict the employer from imposing its own initial terms and conditions of employment. The Court specifically noted:

> In many cases of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase , the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.

In determining whether a successor employer has assumed the obligations of the prior contract, the Board uses a clear and convincing evidence standard. *Cora Reality Co. LLC*, 340 NLRB 366, 369 (2003); *Fieldbridge Associations*, 306 NLRB 322 (1992), enfd. 982 F.2d 845 (2nd Cir. 1993), cert. denied *Local 32B v. NLRB* 509 U.S. 904 (1993). In applying this standard, the Board has found an assumption of the predecessor's contract when a successor employer has taken such actions such as paying the contractual pay rate, contributing to the union's employee trust fund, following the contractual grievance procedures, or honoring the contractual dues check-off provision. *Brookville Health Care Center*, 337 NLRB 1064, 1066 (2002); *Eklund Sweden House Inn*, 203 NLRB 413 (1973); *Stockton Door Co*., 218 NLRB 1053, 1054 (1975). In *Eklund Sweden House, Inn*, the successor employer specifically disavowed the predecessor's collective bargaining agreement in its contract for sale with the predecessor. Regardless of the disavowal, the Board found that the successor's conduct constituted an adoption of the obligations of the predecessor' contract.

The facts of this case reflect that the assets purchase agreement specifically provided for Southern's purchase of assets without the assumption of liability under the collective bargaining agreements. When Southern representatives met with Meyer's employees, the employees were specifically told that Southern was not going to assume the obligations of the collective bargaining agreements. There is no assertion that Southern adopted or assumed any provisions of either the contract with Teamsters 878 or BCTGM Local 111. Accordingly, there is nothing in Southern's conduct to indicate that there was any explicit or tacit acceptance of the contracts that would limit Southern's freedom to set its own terms and conditions of employment as contemplated by the Court's decision in *Burns.*

In *Burns*, the Court also noted that although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." In one of the Board's initial cases in interpreting and applying the *Burns* "perfectly clear" restriction, the Board conceded that the precise meaning and application of the Court's caveat is not easy to discern.[7] The Board, however, concluded that the caveat in *Burns* should be restricted to circumstances "in which the new employer

[7] *Spruce Up Corp*., 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975).

has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment" or at least to circumstances where the new employer has "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."

Applying the principles to the facts of this case, it is apparent that the "perfectly clear" caveat is not applicable. There is no dispute that when representatives of Harlan Bakeries met with employees on March 24, 2005, the employees were given applications and questionnaires to complete. There is no evidence that any representative of Meyer's, Harlan Bakeries, or Southern told employees that Southern intended to hire all the employees without requiring them to apply and meet a designated hiring criteria. While Meyer's or Southern representatives may have stated that all Meyer's employees would be given an opportunity to apply for work, there is no evidence that specific guarantees were made or conveyed to employees. Additionally, there is no dispute that during the March 24, 2005, meetings with employees, Southern representatives unequivocally announced that Southern would not assume the obligations of the existing collective bargaining agreements. At the same time that employees were given applications, they were also given Southern's pay rates and benefits plan. Clearly, employees were given full notice that the wages, benefits, and terms and conditions that they enjoyed under the collective bargaining agreements were not offered to them by Southern. It is apparent that employees were fully aware that their terms and conditions would be different under Southern. Employee Moore testified that prior to Southern's taking over the operation of the facility, employees researched the internet to find out more about Southern's benefits and pay rates.

As the Board explained in *Spruce Up*: "When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit' as that phrase was intended by the Supreme Court." The Board noted that the possibility that the old employees may not enter into an employment relationship with the new employer is a real one. *Id* at 195. The evidence does not support a finding that prior to commencement of its new operation, Southern misled employees into believing that they would all be retained without any change in their wages, hours, or conditions of employment. Accordingly, Southern was free to set its own terms and conditions of employment at the time that it commenced operation in March 2005.

1. The Alleged Unilateral Changes in April 2005

Paragraphs 17 and 18 of the consolidated complaint allege that Southern implemented eight changes[8] on about April 1, 2005, and two additional changes on

[8] In her post-hearing brief, Counsel for the General Counsel references paragraph 18 Continued

April 20 without notice to or bargaining with Teamsters Local 878 and BCTGM Local 111. Specifically, Counsel for the General Counsel maintains that about April 1, 2005, Southern (1) removed union bulletin boards; (2) discontinued the practice of paying premium pay after 8 hours work; (3) discontinued the practice of paying premium pay for work on Sunday; (4) discontinued the practice of paying double time for the seventh consecutive day of work; (5) discontinued the practice of assigning overtime on the basis of seniority; (6) reduced the amount paid for holidays; (7) and discontinued the job bidding procedures and changed the job selection criteria for filling vacancies. The consolidated complaint further alleges that on about April 20, 2005, Southern changed the method of scheduling vacations so that vacations longer than one week could no longer be scheduled and also changed the practice of allowing employees to receive vacation pay in advance of their vacation days.

BCTGM Local 111 asserts without contradiction that under the provisions of Meyer's collective bargaining agreement with the Union, employees were paid $1.50 over regular pay when they worked on Sundays. Employees working the seventh consecutive day were paid double time and overtime was assigned by seniority. Employees working over 32 hours during a holiday week or working on the holiday were paid double time and a half. When there were vacancies to be filled, the job was posted for three working days and then filled by seniority.

BCTGM Local 111 President Royce Stogner testified that between the time when he met with Meyer's representatives on March 23, 2005 and when he met with Southern representatives on April 20, 2005, to begin bargaining, he met with bargaining unit employees on March 31, 2005. The employees confirmed that there had been a "lot of changes" that had taken place. Stogner explained that prior to the time that the Union began meeting with Southern in the summer of 2005 to negotiate a contract, the Union and Southern had no discussions concerning terms and conditions of employment. It was during negotiations in late summer of 2005 that BCTGM Local 111 asked for a copy of the Employee Handbook that was previously distributed to employees and it was provided.

a. Alleged Removal of Bulletin Board

(1) Evidence Presented by the Parties

Burke testified that when Southern began operations, there were bulletin

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subsection (a)(iii) of the complaint as alleging that Southern eliminated two unpaid personal days off per year without notifying or bargaining with Teamsters Local 878. Counsel for the General Counsel submits that inasmuch as there is no evidence that any employee has been denied the benefit, General Counsel requests the withdrawal of this allegation. I note, however that complaint paragraph 18 (a)(iii) deals with the alleged unilateral discontinuance of the practice of paying premium pay for work on Sunday and complaint paragraph 18(a)(viii) deals with the elimination of two unpaid personal days off per year. Assuming Counsel for the General Counsel's request to contain a typographical error, I grant General Counsel's motion to withdraw complaint paragraph 18(a)(viii) relating to the elimination of two unpaid personal days off per year.

boards throughout the facility that were used for both company and employee postings. She explained that during the time that Meyer's operated the facility, there were also glass-enclosed bulletin boards that were used for government or federally required postings. Burke maintained that union materials were not posted on these boards and she denied that union stewards held keys to the glass-enclosed boards. She asserted that the union materials were posted on the unlocked bulletin boards. Maintenance Manager Turner testified that there was only a cork bulletin board in the Maintenance Shop and it remained after Southern began operation of the facility. Burke explained that since Southern has operated the facility, it has received requests from the Unions to post information and the information has been posted on the general bulletin boards. Burke identified a May 5, 2005, e-mail to certain department heads directing them to post a notice of a Teamsters Local 878 union meeting in their departments.

BCTGM Local President Stogner testified that under the terms of the agreement with the Union, Meyer's provided a glass-enclosed bulletin board for the Union in the Break Room area. Chamlee also asserted that there was a provision in the collective bargaining agreement providing for the establishment of the union bulletin boards, however, he did not identify the provision in the collective bargaining agreement. Chamlee testified that he set up union bulletin boards in the receiving, maintenance, and shipping departments shortly after the ratification of the last Meyer's collective bargaining agreement. He described the bulletin boards as having aluminum-framed glass fronts with key locks. Chamlee recalled that he gave keys to the union stewards in the receiving and shipping departments. While the collective bargaining agreement between Teamsters Local 878 and Meyer's covering the period for June 4, 2004 through June 13, 2008 was submitted into evidence, the record is silent as to what portion dealt with the establishment of union bulletin boards.

Tammy Lynn Muldrow worked for Meyer's for approximately 27 years and for Southern from March 29, 2005 until January 21, 2006. Muldrow testified that there were glass-encased union bulletin boards in the Meyer's facility. She recalled that the bulletin boards contained notices of union meetings and information as to how to contact union stewards or business agents. Muldrow testified that on approximately March 31, 2005, she observed building maintenance employee Leon Gaines removing the union bulletin boards. When she asked him why he was doing so, he simply replied that he had been instructed to do so. Gerald McClellan testified that at the time that Southern assumed operation of the facility, the union bulletin board in the shipping department was in a locked glass enclosure. Although McClellan was a steward for Teamsters Local 878, he did not have a key for the board. He estimated that within a week to two weeks after Southern took over the facility, he observed the utility crew removing the bulletin board. Union Steward Louis Page recalled that the bulletin board where he posted union notices was removed not long after Southern began operations. Sanitation employee Moore recalled that the glass-enclosed bulletin boards in the break room and shipping department were removed within two weeks after Southern assumed operation of the facility. She described the boards as union bulletin boards. Moore admitted, however, that in the affidavit given to the

Board during the investigation of the alleged unfair labor practices, she stated that the two union bulletin boards were removed about March 30, 2005. The witnesses who recalled the removal of the union bulletin boards confirmed that the boards were replaced with suggestion boxes.

(2) Factual and Legal Conclusions

Southern acknowledges that under Meyer's operation, Meyer's provided glass-encased, lockable bulletin boards for union information. Southern further acknowledges that the record contains evidence that the boards were required by the collective bargaining agreements and were in addition to other boards for general legal information located through the plant. Southern maintains however, that upon assuming control of the Hope facility on March 28, 2005, it removed all Meyer's information from bulletin boards at the various locations of the facility and by March 30, removed the glass-encased boards and replaced them with suggestion boxes.

With respect to union bulletin boards, the law is well-established. The Board has stated: "In general, there is no statutory right of employees or a union to use an employer's bulletin board." *Honeywell, Inc*., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983). Consistent with the above-described right to set its initial terms and conditions of employment when it hired employees on March 28, 2005, Southern had the right to change or modify Meyer's bulletin board policies. Thus, Southern had no obligation to bargain over the institution or removal of a union bulletin board any more than other initial terms and conditions of employment. While Counsel for the General Counsel may assert that Southern's bargaining obligation with respect to the bulletin boards attached as of the time that Southern hired a majority of Meyer's employees, the removal of Meyer's bulletin board occurred virtually contemporaneously with the initiation of Southern's operation of the plant. There was no hiatus between the cessation of Meyer's operation of the facility and Southern's assumption of the operation of the facility on March 28, 2005. Thus, it would have been unrealistic for Southern to remove the bulletin boards any earlier. Accordingly, I do not find the removal or replacement of the bulletin boards as unilateral changes occurring after the obligation to bargain and in violation of Section 8(a)(5). I also note that the agreement reached between Southern and the BCTGM local 111 on October 1, 2005, and the agreement between Southern and Teamsters Local 878 reached on January 23, 2006 provides for the installation of a Union bulletin boards.

b. Other April 2005 Alleged Unilateral Changes

(1) Evidence Presented by the Parties

Without question, the alleged changes in premium pay, double time pay, holiday pay, personal days off, overtime assignment, and job bidding dealt with pay and benefits that had been negotiated with Meyer's and either incorporated into Meyer's collective bargaining agreements with Teamsters Local 878 and BCTGM Local 111 or were practices arising out of the collective bargaining relationships with the Unions. Burke testified that under Meyer's, employees were paid overtime for

working over 8 hours and were paid premium pay for working on Sundays. Employees were paid double time for the seventh consecutive work day. Burke also confirmed that employees received holiday pay and job bidding was based solely on seniority. Under Meyer's operation, employees were allowed to take more than one week of vacation at a time and they were permitted to receive their vacation pay in advance of the vacation days.

A week before Southern assumed operation of the bakery, Ledbetter and Hal Harlan directed Payroll Manager Sue Saladin to set up a new payroll and timekeeping program. The new system that went into effect the first day of Southern's operation, eliminated the premium pay and calculated overtime only after 40 hours. Burke testified that from the beginning of its operation of the Hope, Arkansas facility, Southern has not paid premium pay for Sundays or for employees who worked seven consecutive days. Southern has not paid employees holiday pay and Southern has paid overtime based only upon an employee's working over 40 hours per week. Burke also confirmed that until Southern later reached an agreement with the BCTGM Local 111 and Teamsters Local 878, employees were selected for jobs based upon their knowledge and ability to do the job. There was not a job bidding procedure utilizing seniority.

Maintenance Manager B.J. Turner attended the employee meetings on March 14, 2005 when applications were distributed to the Meyer's employees. He recalled that approximately 200 employees attended the first meeting and approximately 130 to 140 employees attended the second meeting. He participated in the meetings by handing out the applications, as well as the wage rates and employee benefits information. He recalled that during one of the meetings, employees asked about whether they would continue to be paid overtime after 8 hours and whether they would receive premium pay for Sunday. Turner testified that in response to the questions, Harlan told employees that they would not receive premium pay for Sundays or overtime for working over 8 hours.[9] Turner could not recall the names of the employees who asked about premium pay and overtime.

Shipping department employee Gerald McClellan did not recall any comments by Harlan on March 24 about overtime pay, premium pay, double time for working seven consecutive days, holiday pay, or the job bidding process. He did recall, however, that immediately after Southern began operations, employees were told that they were limited to one week of vacation at a time and that they could not receive vacation pay in advance of their vacation.

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[9] Counsel for the General Counsel confronted Turner with the absence of any reference to these specific questions in the affidavit given to the Board during the investigation. Turner acknowledged that while he had not mentioned the specific questions in his affidavit, the Board Agent taking the affidavit had not specifically asked about overtime and premium pay. In response to questions by Southern's Counsel, Turner confirmed that his affidavit included: "There were many questions asked at each meeting by the employees." Turner testified that the Board Agent taking his affidavit had not asked what questions were posed by the employees and had only asked if there was discussion about the Union.

Sanitation employee Moore testified that there were no discussions in the March 24 or March 28 meetings about overtime pay, premium pay, double-time pay for the seventh consecutive work day, overtime assignments, job bidding, the availability of personal days, or the procedure for taking vacation time.

Shipping department employee Carry Harris did not recall any discussions during meetings on March 24 or March 28 about Southern's conditions of employment. He confirmed that while he took a two-week vacation in April 2005, he did not receive his vacation pay in advance of his vacation. Union Steward Louis Page testified that when Southern began operations, he was initially told that he could take his two weeks of vacation in April 2005. He neither identified who told him that he could take two weeks nor identified the means of communication. He confirmed, however, that Mike Nelson told him in May that he could only take one week.

As discussed above, there is no dispute that representatives of Meyer's and Southern informed employees and the unions that the assets purchase agreement did not provide for the assumption of the collective bargaining agreements. Hayden recalled that during the meetings with employees on March 24, employees asked questions about holiday and overtime pay. Hayden also recalled that Harlan was asked about the possibility of changing the work schedule for maintenance employees. Maintenance Manager Turner recalled that during the two March 24, 2005 meetings that he attended, there were questions about overtime and premium pay. By contrast, Human Resources Manager Burke as well as employees McClellan, Moore, and Harris testified that they did not recall any discussions about any specific terms and conditions of employment. The record, therefore, reflects that both employees and managers having varying recall as to whether specific terms and conditions of employment were discussed in the individual meetings they attended prior to the time that Southern began operating the facility.

(2) Factual and Legal Conclusions

Counsel for the General Counsel asserts that since Southern's obligation to bargain attached on March 28, any changes not announced were subject to bargaining with the employees' bargaining agents. I am unaware, however, of any cases where the Board has found that a successor must expressly delineate the specific terms and conditions of employment that it intends to implement. Based upon the Board's directive in *Spruce Up Corp*., 209 NLRB at 195, it appears that when a successor clearly announces an intent to change terms and conditions of employment before employees are hired, there is sufficient notice to employees that they will not retain their existing terms and conditions of employment under the predecessor employer.

Accordingly, it is apparent that prior to the time that the employees accepted employment, Southern did not specifically address premium pay for Sundays or for work exceeding six consecutive days, overtime pay, assignment of overtime by

seniority, holiday pay, job bidding procedures, or the procedures for job selection. Despite the fact that these specific terms and conditions may not have been specifically addressed, offers of employment were made to employees at the same time those employees were told that Southern would not assume the obligations of the collective bargaining agreements and those employees would receive different wages and benefits than what had been paid by Meyer's. Under these circumstances, it is not plausible that employees would have assumed or mistakenly concluded that their terms and conditions of employment with Meyer's would continue with Southern.

Accordingly, I do not find that Southern unlawfully engaged in the following actions as alleged in complaint paragraphs 17 and 18: (1) discontinuance of paying overtime premium pay after 8 hours; (2) discontinuance of paying premium pay for work on Sunday; (3) discontinuance of paying double time for the seventh consecutive day of work; (4) discontinuance of assigning overtime on the basis of seniority; (5) reduction in the amount paid for holidays; (6) discontinuance of the job bidding procedures and change in job selection criteria for filling vacancies and (7) discontinuance of the practice of allowing employees to receive vacation pay in advance of their vacations.

Ledbetter testified, however, that when Southern began operations, employees were allowed to take more than one week of vacation at a time. He admitted that later in the summer, however, the practice was discontinued without bargaining with either Union. Accordingly, I find that by discontinuing the practice of allowing employees to take more than one week of vacation at a time, Southern violated Section 8(a)(5) of the Act.

2. The alleged May 9 changes in classifications and/or rates of pay

a. Evidence Presented by the Parties

Paragraph 17(c) alleges that on or about May 9, 2005, Southern changed employee classifications and/or rates of pay for brewmakers, divider operators and k/divider operators. Southern does not dispute that Hal P. Harlan issued a memorandum to employees on May 9, 2005, referencing his recent visit to the bakery and his meeting with employees. Harlan explained in the memorandum that its purpose was to offer follow-up to employee questions. As a part of his discussion of various issues and questions, he confirmed that some employees requested that Southern reevaluate their current classifications to determine whether they were in the right pay classification. Harlan confirmed that he had spoken with Ledbetter, Nelson, and Rich Turner and determined that certain positions should have been classified Level 3 instead of Level 2 when Southern hired those people who worked in the Brewmaker and Divider and K/divider operator positions. Ledbetter testified that certain employees received a wage increase as a result of their placement in the correct classifications. While Southern did not bargain with the Union concerning this adjustment in classifications, Southern maintains that rather than a change in terms and conditions of employment, Southern only corrected a misclassification.

b. Factual and Legal Conclusions

In *Banknote Corp. of America*, 315 NLRB 1041 (1994), enfd. 84 F.3d 637 (2nd Cir. 1996), cert. denied 519 U.S. 1109 (1997), the Board found that a successor had carefully structured its transition to avoid the "perfectly clear" caveat of *Burns*. The successor sent notice to the unions representing the predecessor's bargaining unit employees, advising that it would not adopt the collective bargaining agreements and that it would impose new terms and conditions of employment. Four days after hiring the predecessor's employees, the successor announced additional unilateral changes in working conditions. The Board found these additional unilateral changes violative of Section 8(a)(5) because, a bargaining obligation had already attached with respect to any subsequent changes. As a *Burns* successor, Southern was free to set its initial terms and conditions of employment and prior to its obligation to bargain with the unions. Southern's obligation to bargain however, attached at such time that it hired a majority of Meyer's employees. Accordingly, the changes in employee classifications made in May 2005 constitute unilateral changes in violation of Section 8(a)(5).

3. Alleged Unilateral Changes On or About June 15, 2005

Paragraph 17(d) alleges that on or about June 15, 2005, Southern eliminated the grievance procedure and imposed harsher discipline for no call/no show attendance infractions. The consolidated complaint further alleges that these changes were made without notice or bargaining with BCTGM Local 111.

a. Alleged elimination of grievance procedure

(1) Evidence Presented by the Parties

Meyer's collective bargaining agreements with Teamsters Local 878 and BCTGM Local 111 provided for a grievance and arbitration procedure. Because Southern did not adopt the existing collective bargaining agreements when it assumed operation on March 28, 2005, there was no continuation of the grievance process for those employees represented by Teamsters Local 878 or BCTGM Local 111. Southern's Employee Handbook, distributed to employees in early June, 2005 includes a section identified as Facility Rules and Disciplinary Procedures, The Handbook also provides that an employee's employment relationship is such that employment can be terminated with or without cause, and with or without notice, at any time, at the option of either the employee or the Company. While I note that the actual handbook itself was not distributed to employees until approximately June, 2005, there is no evidence that Southern at any time recognized or followed the grievance procedures contained in Meyer's collective bargaining agreements with either Teamsters Local 878 or BCTGM Local 111.

(2) Factual and Legal Conclusions

Counsel for the General Counsel acknowledges that when Southern hired employees it made an announcement regarding how disputes would be resolved. The Complaint Procedure outlines a four-step procedure that ultimately provides for resolution by one of the owners of Harlan Bakeries. The Complaint Procedure was also included in the Employee handbook. General Counsel submits that this procedure does not provide for employee representation as the Union is excluded from the process. As discussed above, Southern acted within its right to establish its own terms and conditions of employment when it began its operation of the facility. Because Southern was not bound by the terms of the collective bargaining agreements, there was no requirement that it adhere to the grievance process contained in either collective bargaining agreement. I find that the Complaint Procedure initially issued to employees and later restated in the Employee Handbook constitutes an initial term and condition of employment, rather than a unilateral elimination of the grievance procedure as alleged in paragraphs 17 and 18 of the complaint.

b. Allegation of Harsher Discipline for Attendance Infractions

(1) Evidence Presented by the Parties

General Counsel relies upon a comparison of Southern's Facility Rules and Disciplinary Procedures given to employees on March 28, 2005 and the Employee Handbook issued in June, 2005 as indicative of Southern's unilateral imposition of harsher discipline for no call/no show attendance infractions. The Facility Rules and Disciplinary Procedures summary organizes the rules into three categories and designates the kind of discipline that will be imposed for rule violations. Rule Group "C" provides for progressive discipline for attendance infractions. Rule number 9 in Group "C" offenses provides:

> Any employee who fails to report or call in for two (2) consecutive scheduled working days will be deemed to have voluntarily quit.

The Employee Handbook also contains Facility Rules and Disciplinary Procedures and groups the rules into three categories. Group "C" relates to attendance infractions and provides the following in Rule 9:

> Any employee who fails to report or call in on a scheduled working day will be deemed to have voluntarily quit. (No call/No Show).

Southern asserts, however, that the Handbook does not change the initial rules with respect to an employee's job abandonment. Specifically Southern points to Group "A" offenses in the Facility Rules and Disciplinary Procedures that provide discipline for conduct that "could interfere with or damage the business or reputation of the Company, or otherwise violate accepted standards of behavior" and may result in immediate discharge. Rule 23 in Group "A" is identified as:

> Job abandonment, including failure to timely notify the Company of an absence – i.e. no call/ no show without an excused reason, leaving an assigned work area without permission – i.e. walking off the job.

Rule 22 in Section "A" of the Employee Handbook identifies the same offense with identical wording as is found in the original Facility Rules and Disciplinary Procedures. After asserting that there is consistency between the two rules on job abandonment, Linda Burke testified that from Southern's perspective, Southern's rule for no call/no show has always been only one day.

(2) Factual and Legal Conclusion

There is certainly no question that Southern used the same wording in both documents to address the possibility of immediate discharge for an employee's job abandonment. It is equally apparent, however, that the two documents differ with respect to when an employee will be subject to the progressive discipline system for failing to report or call in on a scheduled work day. Although Southern makes the argument that failing to report or call in is the same as job abandonment, it chose to address these offenses in different sections of both the Rules and the Handbook. Southern has presented no evidence to show that management ever communicated this interpretation to employees verbally or in writing. Thus, by the issuance of the Handbook in June 2005, employees were subject to progressive discipline for failing to report or call in for work after only one scheduled working day rather than two. Southern does not dispute that it did not bargain with either Teamsters Local 878 or BCTGM Local 111 with respect to the rules and policies contained in the Handbook. Accordingly, I find merit to complaint paragraph 17(d)(ii) and find that on or about June 15, 2005, Southern unilaterally imposed harsher discipline for no call/no show attendance infractions.

4. Alleged Unilateral Changes in Wage Rates

a. Evidence Presented by the Parties

Paragraph 19 (d) of the consolidated complaint alleges that on or about October 2, 2005, Southern increased the rate of pay for certain receiving department employees. Paragraph 19 (e) of the consolidated complaint alleges that on or about October 28, 2005, Southern decreased the rate of pay for certain receiving department employees.

Wendall Cox heads the receiving department and inventory control for Southern. He worked for Meyer's for 27 years prior to his employment with Southern. Each morning receiving department employees meet with Cox to receive information on their work for the day. During one of morning meetings just prior to October 2, 2005, one of the employees told him that other employees in the same classification as receiving employees were making more money. Cox told the employees that he would look into it. When Cox went to Linda Burke's office, he told her that he was

checking to determine if his employees were getting top pay for their classification.

Burke recalled Cox's visit to her office to discuss his employee's dissatisfaction with their wages and his desire to give them more pay. During the time of Cox's visit to the office, Burke referred to a listing of plant wages that she found on her desk. The document reflected that it was a listing of plant wages that had been revised on May 15, 2005. Burke testified that she had not known who had produced the document, but she assumed that it was the current employee wage scale. Based upon the document, it appeared that certain of Cox's receiving employees were due to an increase in wages. As a result of their discussion, Cox went to the payroll manager and completed the necessary paperwork for the increase in wages. Cox acknowledged that prior to initiating the raise for his employees, he did not speak with Ledbetter or anyone else in management other than Burke.

Burke was not aware that she and Cox had consulted the wrong pay scale until Ledbetter later came to her and inquired about the basis for the wage increase. In order to correct the mistake, the employees' pay scale was corrected and the employees were given written notification of the mistake. In a letter to the affected employees, Ledbetter stated:

> On October 02, 2005, payroll made an hourly rate change to your pay increasing your hourly rate fifty cents per hour. This was an administrative error caused by referencing the wrong pay scale document. This error has been corrected as of 16 October. The Company will not require that you repay us for this error.
>
> We apologize for any confusion caused by this administrative error. If you have questions, please feel free to call me or drop by my office.

Cox testified that when he had initiated the raises for the employees, he had not known that raises could not be given to employees during contract negotiations.

b. Findings and Conclusions

Having heard the record testimony, I have no doubt that Cox initiated the raises for his employees without any thought or awareness of an existing bargaining obligation. His testimony clearly indicates that his intent was to correct a mistake in pay for his employees; an admirable motivation for any supervisor. His well-meaning action, however, was further complicated when he and Burke reviewed the incorrect scale to determine the appropriate wages for his employees. Crediting the testimony of both Cox and Burke, it is apparent that neither of them were aware that their actions constituted a unilateral change in pay for certain employees. It is well settled, however, that wages are a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 348 (1958). Even though the action may have initiated through a mistake, Southern's October 2, 2005 increase in the rate of pay for certain receiving department employees occurred without notice to or bargaining with the BCTGM Local 111. Such unilateral changes in wages have been found to be

violative of Section 8(a)(5) of the Act. See *Lexus of Concord, Inc*., 330 NLRB 1409, 1418 (2000); *Clark United Corp*., 319 NLRB 328, 329 (1995). Accordingly, I find that Southern's increase of wage rates on or about October 2, 2005, violated Section 8(a)(5) of the Act.

General Counsel also alleges that Southern violated Section 8(a)(5) of the Act when it rescinded the pay rate changes for the receiving department employees on or about October 28. Southern asserts that the rescission of the increase in wage rates was simply a correction of its earlier mistake. Southern asserts that even if the pay increase is determined to be an unfair labor practice, it took immediate and reasonable steps to repudiate the conduct. Counsel for Southern cites two administrative law judge decisions in support of its argument that an employer may avoid liability under the Act by repudiating unlawful conduct. It is well-settled however, that the bargaining representative should make the final determination as to whether or not to seek the rescission of unilateral changes which have benefited the represented employees. *Herman Sausage Co*., 122 NLRB 168 (1958), enfd. 275 F.2d 229 (5th Cir. 1960). While Southern may have rescinded the pay increase in order to correct its earlier mistake, it did so without consultation or bargaining with the Union. Accordingly, Southern's rescission of the unilateral increase in wage rates for certain receiving department employees also constitutes a unilateral change in violation of Section 8(a)(5).

K. The Alleged Direct Dealing with Employees

Paragraph 19 of the Consolidated Complaint alleges that in about mid-May 2005, Southern bypassed Teamsters Local 878 and dealt directly with its employees in the shipping, receiving and maintenance Unit by soliciting employees' approval regarding a schedule change in the maintenance department. In a memorandum to employees dated May 9, 2005, Hal P. Harlan stated that he had spoken with maintenance employees and he understood that the majority of employees wanted to move to a new schedule. Harlan added that he had spoken with the management team about this change and Southern agreed to change the work schedule effective as soon as possible.

Ledbetter testified that when Southern assumed operation of the facility, the maintenance employees worked three shifts. The agreed-upon change referenced in the May 9, 2005 memorandum provided for the creation of four maintenance crews that would allow every employee to have a long weekend on alternating weeks. Ledbetter testified that while the issue of a change in the maintenance schedule was discussed during Meyer's negotiations with Teamsters Local 878, the parties never reached and agreement. Ledbetter asserted that after Southern assumed operation of the facility, two individuals that he assumed to be employee union representatives approached Southern with the request to change the work schedules. Ledbetter identified these individuals as Shayne Carter and Delano Hackler. He explained that these two individuals were not only on the bargaining committee for the Union when Teamsters Local 878 previously bargained with Meyer's, but they were also union stewards for Teamsters Local 878. Ledbetter testified that Southern considered that

Hackler and Carter were still stewards. Burke identified a May 5, 2005 letter to her from Carlton Collins, Assistant Business Agent for Teamsters Local 878. In the letter, Collins identifies Shayne Carter and Delano Hackler as two of the five Union committee members who would participate in the contract negotiations that were scheduled to begin on May 12, 2005.[10] Collins, however, testified that he never told management officials for either Meyer's or Southern that stewards had authority to negotiate on behalf of the Union with respect to conditions of employment.

Turner testified that Carter and Hackler presented him with the proposed schedule to allow maintenance employees to have every other weekend off. Turner took the schedule and modified it to provide for the four shifts. He posted the modified schedule on the bulletin board for employees to review. After giving employees an opportunity to review the proposed schedule for three weeks to a month, he polled the employees to determine if they wanted to try the schedule. All of the employees confirmed to him that they wanted the changed schedule. He recalled that the new schedule began sometime in the middle of May, 2005.

Vice-President Collins recalled that prior to the April 21, 2005 bargaining session; he had heard that maintenance employees had been given a different schedule. Ledbetter confirmed during the meeting that a couple of maintenance employees had approached Southern about a change in schedule and the employees had voted for the change. Ledbetter acknowledged to Collins that the change was made without notifying the Union.

Admittedly, the change in the schedule for the maintenance employees was initiated without notice to or bargaining with the Teamsters Local 878. Additionally, there is no dispute that the change was made after Southern's bargaining obligation attached. While Southern excuses such action by asserting that the request for the change was made by two union stewards, there is no evidence that these individuals were authorized to bargain on behalf of all employees in the bargaining unit. Accordingly, I find that Southern by-passed Teamsters Local 878 and dealt directly with its employees in the shipping, receiving, and maintenance unit by soliciting approval regarding a schedule change and in violation of Section 8(a)(5) of the Act.[11]

L. Norman D. Wilson's May 13, 2005 Discharge

1. Evidence Presented by the Parties

Paragraph 16 of the consolidated complaint alleges that Southern terminated Wilson because he assisted a union and engaged in concerted activities. The

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10 Union Vice President Collins testified that toward the end of May, 2005, the Union informed Southern that Carter and Hackler were being replaced on the negotiating committee.

11 The Board has found that when an employer bypasses its employees' exclusive collective bargaining representative and deals directly with its employees concerning wages, hours, and conditions of employment, it violates Section 8(a)(5) of the Act. See *JPH Management Inc*., 331 NLRB 1032, 1033 (2000).

consolidated complaint also alleges that Southern terminated Wilson because Chamlee and the BCTGM Local 111 filed charges with the Board and because employees gave testimony to the Board in the form of affidavits.

Wilson worked for Meyer's for over 8 years. He worked on third shift as a boxer in production at the time that Southern acquired Meyer's assets in March 2005. In January 2005, Meyer's Human Resources Department was informed that Wilson and an employee in the packing department had engaged in inappropriate physical contact in the production area. Upon learning of the alleged incident, Production Manager Brian Weems suspended Wilson pending Burke's investigation of the matter. Approximately a week and a half later, Weems conducted a meeting with Wilson concerning the incident. Wilson does not dispute that he signed a document dated February 2, 2005, referenced as "Disciplinary Action for Improper Conduct on 01/20/05." The document was also signed by Union Steward Tony Austin, Weems, and Burke. The fourth paragraph of the document includes the following:

> Norman was suspended on 01/21/05 pending investigation of the incident. In accordance with the rules Norman should be terminated effective to the date of the incident; however, Management has agreed, considering Norman's past record and his long-term employment with the Company, to allow his employment to be reinstated as a one-time "last chance" disciplinary warning without back pay.

The form additionally contained wording to evidence that Wilson understood the terms and conditions of his reinstatement of employment as outlined in the form. Weems testified that during the meeting, he and Burke explained to Wilson that he was reinstated to his job as a one-time last-chance disciplinary warning. Weems recalled that a few days after the meeting, Wilson approached him about the disciplinary letter in his personnel file. Weems told him that as long as he didn't violate the rules again, it would not be a problem. Weems denied, however, that he ever said anything to Wilson to indicate that the February 2, 2005, document meant anything other than what was contained in the document.

Wilson admitted that he was suspended because of the January 2005 incident. He described the other employee who was involved in the incident as "very playful." He also admitted that he participated in an investigatory meeting concerning the incident. While he denied that he had touched the other employee inappropriately, he contended that his touching her "was always in a playful way, no more than she played with the other guys." Wilson testified that during the February 2 meeting with Weems and Burke, he was told that he could return to work without backpay for the period of the suspension.

Wilson signed his application for employment with Southern on March 24, 2005. Included on the page with his signature is the wording: "It is understood and agreed upon that any misrepresentation by me will be sufficient cause for cancellation of this application and/pr separation from the Employer's service if I have been employed. Wilson completed the applicant questionnaire on March 25, 2005.

In response to the question as to whether he had a written warning, or layoff disciplinary action in the past twelve (12) months, Wilson marked "no." On March 28, 2005, Wilson was hired by Southern to work in the same job that he had performed at Meyer's.

Weems recalled that in early May, Plant Manager Mike Nelson came to his office and that told him that Wilson's prior discipline had been overlooked during the hiring process and Wilson had denied any prior discipline in his application for employment with Southern. Burke testified that while she is the person who normally inputs discipline records into the computer, she did not know why she had failed to input Wilson's February 2, 2005 discipline. She recalled that the discipline occurred just prior to Meyer's bankruptcy it was an oversight in failing to do so.

Ledbetter testified that during the course of the Board's investigation of Southern's alleged unfair labor practices in May 2005, the Union alleged[12] that ten individuals with disciplinary actions had been hired. In response to the Union's allegations, Southern conducted a review of the personnel files for the named employees. Southern found an explanation for hiring all of the individuals except for Wilson. In reviewing Wilson's personnel file, Southern discovered his February 2, 2005 disciplinary warning. When Southern reviewed Wilson's application questionnaire, it determined that Wilson falsified his application by denying that he had received any discipline during the previous 12-month period.

Weems testified that Wilson was terminated because he falsified his employment application. Weems further testified that while he had known about Wilson's prior discipline, no one with Southern asked him opinion as to whether any employees should be hired or not hired. Ledbetter also confirmed that during the hiring process, Human Resources personnel did not speak with individual supervisors to determine if employees had received written warnings during the previous 12 months. Ledbetter acknowledged that had it not been for the inquiry from the Board, Wilson would not have been terminated. He explained that Southern would not have taken any action until the discovery of a problem.

In defense of why he excluded his discipline from his application questionnaire, Wilson asserted that he didn't think that he had received a written warning for the incident. On direct examination, Wilson was asked if there was anything said during this meeting about his receiving a written warning. Wilson contended that there was not and then he added that Weems told him "This is not a write-up. This is just to show that we talked about this incident." Wilson admitted, however, that prior to signing the February 2, 2005 Disciplinary Action letter, he read it and looked over it. He also admitted that the union steward had also read the letter before signing the document. Wilson acknowledged that he did not ask for any

[12] While the record does not specifically reflect the alleged unfair labor practice being investigated, I note that on April 4, 2005, Chamlee filed a charge alleging that Southern had unlawfully failed to hire him and four other individuals in March 2005.

wording change in the document prior to signing it.

2. Factual and Legal Conclusions

Section 8(a)(4) of the Act provides that an employer commits an unfair labor practice when it discharges or otherwise discriminates against an employee because he has filed charges or given testimony under the Act. This case includes no evidence that Wilson filed charges with the Board or even spoke with a representative of the Board prior to his discharge. General Counsel maintains, however, that Southern terminated Wilson because Chamlee and the BCTGM Local 111 filed charges with the Board and employees gave testimony to the Board in the form of affidavits.

In an early decision, the Supreme Court noted that while the language of Section 8(a)(4) could be read strictly to apply only to formal charges and formal testimony, the language can also be read more broadly. *NLRB v. Schrivener*, 405 U.S. 117, 122 (1972). The *Schrivener* rationale has led to the interpretation of Section 8(a)(4) as a protection of employees who merely threaten to file charges with the Board, *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 (6th Cir. 1987) or to employees who provide information to the Board that assists another employee, *National Surface Cleaning, Inc. v. NLRB*, 54 F.3d 35 (1st Cir. 1995). Thus, while Wilson may not have personally initiated the charges or provided testimony to the Board in support of the charges, his discharge would be violative if Southern discharged him because of the charges filed by Chamlee and the BCTGM Local 111. I do not, however, find sufficient evidence of such retaliation.

The Board has held that a *Wright Line* analysis also applies to Section 8(a)(4) claims. *McKesson Drug Co*., 337 NLRB 935 (2002); *Freightway Corp*., 299 NLRB 531, 532 (1990); *Taylor & Gaskin*, 277 NLRB 563, fn. 2 (1985). Using the analysis set forth in *Wright Line*, 251 NLRB 1093 (1980), General Counsel must make out a *prima facie* showing sufficient to support the inference that the filing of the charges by BCTGM Local 111 and Chamlee was a "motivating factor" in Southern's decision to terminate Wilson. A *prima facie* case is made out when General Counsel establishes protected activity, employer knowledge, adverse action taken against those involved or suspected of involvement, which has the effect of encouraging or discouraging protected activity, and animus*. Farmer Bros. Co*., 303 NLRB 638, 649 (1991). The Board has also described this fourth factor as a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co*., 338 NLRB 644, 645 (2002). If the General Counsel can establish all four elements, a presumption is created that the adverse action violated the Act. To rebut that presumption, a respondent must show that the same action would have taken place even in the absence of the protected activity. *Manno Electric, Inc*., 321 NLRB 278, 280 at fn. 12 (1996).

The undisputed facts in this case demonstrate that General Counsel has met its initial burden under the *Wright Line* analysis. While Wilson engaged in no apparent protected activity, the charges filed by Chamlee and BCTGM Local 111 are

clearly within the framework of 8(a)(4) protected activity. While Southern did not emphasize the timing, there is no question that it was the charges and the subsequent Board investigation that alerted Southern to review Wilson's prior disciplinary record in May 2005. Finding that Wilson had the requisite disciplinary action in his file, Southern terminated him in accordance with the March 2005 hiring criteria. Accordingly, were it not for the charges and Board's investigation, Wilson's erroneous hiring may never have been discovered.

Counsel for the General Counsel argues that Wilson was terminated to conceal Southern's unlawful motivation for not hiring Chamlee. I find no record evidence, however, that would support this conclusion. Southern argues that if Wilson's testimony is taken at face-value and Meyer's did not intend Wilson's written last-chance notice to serve as a written warning, Wilson is entirely irrelevant to Chamlee's non-hire. Southern argues that inasmuch as Wilson argues that the write-up was not disciplinary in nature and was not a basis to exclude him from hire by Southern, there was no need for Southern to use Wilson's discharge to sanitize its hiring practices relative to Chamlee. While Wilson's credibility is not pivotal in determining the merits of this allegation, I do not find Wilson to be a credible witness. His explanation that he did not consider himself to have received discipline despite his suspension and "last chance" reinstatement has no credible basis.

Despite the fact that Wilson was terminated after the error was discovered, I do not find sufficient evidence of a discriminatory discharge. Without question, a determination of whether an employee has been unlawfully discharged is based upon demonstrable record evidence rather than equitable considerations. There have been limited occasions, however, where the Board has considered equity as a factor in fashioning an appropriate remedy. In a 1966 decision[13] involving an issue of whether backpay is tolled during the period between the administrative law judge's decision and the Board's decision, the Board noted that in virtually all cases, an employer has no equitable standing to claim credit for the periods of time in which an intermediate reviewer erroneously thought the employer's conduct to be lawful. The Board noted:

> However, in the infrequent cases in which an employee is terminated as a result of employer conduct which, while an unfair labor practice, does not bespeak such a clear intent, the Board will be more receptive to such employer contentions as, for example that it was justifiably reliant on a decisional error or on an expectation that the Board would adhere to a particular view of the law. When the respondent is not an ill-intentioned offender, as he is in an 8(a)(3) case which turns on motive, the balance of equities between the respondent and the employee draws closer to equilibrium, and the Board will consider more sympathetically any substantial defenses the respondent may proffer against a full backpay remedy.

13 *Ferrell-Hicks Chevrolet, Inc*., 160 NLRB 1692, 1697-1698 (1966).

While the Board discussed such equitable considerations in relation to fashioning an appropriate remedy, these principles may also lend guidance in viewing the circumstances of this case. As discussed in an earlier portion of this decision, I find that Southern is jointly and severally liable for Chamlee's unlawful discipline by Meyer's. While Southern did not exist at the time of Meyer's unlawful conduct, Southern now bears the responsibility for correcting the wrongdoing by virtue of its successorship. During the investigation of the underlying charges, the Board discovered evidence that Southern offered employment to Wilson; an employee who had received discipline within the requisite twelve-month period. In response, Southern conducted an investigation of the alleged disparity and attempted to correct the error by terminating Wilson. There is no evidence that Southern was motivated by any other factor other than to correct an error in its hiring procedure. There is no evidence that Southern hired Wilson with knowledge of his prior discipline. While it is undisputed that Ledbetter, Weems, and Burke had been involved in issuing the discipline to Wilson, there is no evidence that any of these individuals were cognizant that Wilson's discipline was erroneously omitted from the information provided to Hayden during the application process. As discussed above, I have found that Southern is required to reinstate Chamlee and to restore him to his previous employment status. To require the reinstatement of Chamlee and to also penalize Southern for its attempt to correct a disparity in hiring caused by Meyer's documentation error is a dichotomy that frustrates public policy and equitable considerations. Moreover, while Wilson may have been terminated as a result of the underlying unfair labor practice charges, there is no evidence of an unlawful motive. The record evidence reflects that Wilson's conduct and the ensuing disciplinary action clearly removed him from the objective hiring criteria. The overall evidence supports a finding that Southern would not have employed Wilson, but for an apparent error in Meyer's documentation. Thus, Southern has met its burden of demonstrating that Wilson would not have been hired despite any Union or protected activity by other employees. Accordingly, I do not find Wilson's termination in violation of the Act.

Conclusions of Law

1. Since March 28, 2005 Respondent Southern Bakeries, LLC has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Prior to March 28, 2005, Meyer's Bakeries, Inc. was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent Southern Bakeries, LLC is a successor to Meyer's Bakeries, Inc. as defined in *Burns*[14] and *Golden State.*[15]

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14 *NLRB v. Burns International Security Services, Inc*., 406 U.S. 272 (1972).

15 *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973).

4. Chauffeurs, Teamsters and Helpers Local Union, No. 878, affiliated with International Brotherhood of Teamsters, herein Teamsters Local 878, is a labor organization within the meaning of Section 2(5) of the Act.

5. Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC Local 111, herein BCTGM Local 111, is a labor organization within the meaning of Section 2(5) of the Act.

6. The following employees of Respondent Southern constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All maintenance employees, all shipping department clerks, lead persons, loaders/pullers, stackers, and all receiving department employees employed at the Hope, Arkansas facility; excluding all office clerical employees, all other hourly employees, professional employees, technical employees, guards and supervisors as defined in the Act.

7. The following employees of Respondent Southern also constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees within the production and sanitation departments employed at the Hope, Arkansas facility; excluding all transportation drivers, garage attendants, engineers, dispatchers, technical employees, office clerical employees, watchmen, guards and supervisors as defined in the Act.

8. By threatening an employee with discipline, discharge, or unspecified reprisals because he engaged in union and other protected activities, Respondent Meyer's violated Section 8(a)(1) of the Act.

9. By issuing written warnings to Michael Chamlee on or about August 20, 2004 and March 17, 2005, Respondent Meyer's violated Section 8(a)(3) and (1) of the Act.

10. By failing to hire Michael Chamlee on March 28, 2005, Respondent Southern violated Section 8(a)(3) and (1) of the Act and as a successor to Respondent Meyer's, Respondent Southern is fully responsible for offering employment to Michael Chamlee and to make him whole for any losses resulting from Respondent Meyer's unlawful discipline to him on August 20, 2004 and March 17, 2005 and for Respondent Southern's failure to hire Chamlee on March 28, 2005.

11. By unilaterally changing certain employee classifications on or about May 9, 2005, Respondent Southern violated Section 8(a)(5) of the Act.

12. By unilaterally imposing harsher discipline for no call/no show attendance infractions on or about June 15, 2005, Respondent Southern violated Section 8(a)(5).

13. By unilaterally increasing the rate of pay for certain receiving employees on or about October 2, 2005, Respondent Southern violated Section 8(a)(5) of the Act.

14. By unilaterally decreasing the rate of pay for certain receiving department employees on or about October 28, 2005, Respondent Southern violated Section 8(a)(5) of the Act.

15. By bypassing Teamsters Local 878 and dealing directly with its employees in the shipping, receiving and maintenance Unit by soliciting employees' approval regarding a schedule change in the maintenance department, Respondent Southern violated Section 8(a)(5) of the Act.

16. By changing the method of scheduling vacations so that vacations longer than one week could no longer be scheduled, Respondent Southern violated Section 8(a)(5) of the Act.

17. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

18. Neither Respondent Meyer's nor Respondent Southern violated the Act in any other manner as alleged in the consolidated complaint.

Remedy

Under the Supreme Court's *Golden State* decision, a successor, aware of the unfair labor practices committed by its predecessor, has joint and several liability with the predecessor to remedy those violations.

For the reasons that I have discussed above, I have found that Respondent Southern, had reason to be aware of the unfair labor practices committed by Respondent Meyer's and was a *Golden State* successor to Respondent Meyer's. I have also found Southern's failure to hire Chamlee as violative of Section 8(a)(3) and (1) of the Act. Accordingly, Respondent Southern must offer employment to Michael Chamlee and to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of Respondent Southern's failure to hire him to the date he is offered employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent Southern having unilaterally imposed a harsher discipline for no call/no show attendance infractions, must rescind this unilateral change and rescind any discipline issued to employees as a result of this unilaterally implemented

change. Further, inasmuch as Southern has negotiated a collective bargaining agreement with both the BCTGM Local 111 and Teamsters Local 878, I recommend that Southern make whole those employees who have been affected by the unlawful unilateral changes from the date of the unlawful change to the date of the agreement that would cover the affected employees.

Respondent Southern having unilaterally changed the method of scheduling vacations so as to preclude the taking of vacations for longer than one week must rescind this unilateral change and bargain with the Unions concerning this matter, if it has not already done so.

I have also found that Respondent Southern unilaterally reclassified employees on or about May 9, 2005, dealt directly with employees concerning a change in the schedule for maintenance employees, and unilaterally decreased the rate of pay for certain receiving department employees on or about October 28, 2005. While I would normally recommend the rescission of all unilateral changes, nothing in this order should be construed as requiring rescission of benefits granted to unit employees as a part of any unilateral changes.

Having found that Respondent Southern has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[16]

ORDER

Respondent Meyer's, Hope, Arkansas, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act:

1. Within 14 days from the date of this Order, duplicate and mail, at its own expense, a copy of the attached notice marked as "Appendix A"[17] to all employees who were employed at the Hope, Arkansas facility during the time period between August 20, 2004 and the cessation of Meyer's operations on or about March 27, 2008.

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[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

2. Within 14 days from the date of this Order, expunge from its files any reference to the written discipline issued to Michael W. Chamlee on August 20, 2004 and March 17, 2005, and notify Chamlee in writing that this has been done.

3. Within 14 days from the date of this Order, request that Southern Bakeries, LLC expunge from Meyer's records and files in Southern's possession, all records referencing or relating to the discipline issued to Michael W. Chamlee on August 20, 2004 and March 17, 2005, and notify Chamlee in writing when this request to Southern Bakeries LLC, has been made.

Respondent Southern, Hope, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing employee classifications and pay rates without bargaining with its employees' collective bargaining representative.

(b) Unilaterally imposing harsher discipline for no call/no show attendance infractions without bargaining with its employees' collective bargaining representative.

(c) Unilaterally increasing the rate of pay for employees without bargaining with its employees' collective bargaining representative.

(d) Unilaterally decreasing the rate of pay for employees without bargaining with its employees' collective bargaining representative.

(e) Bypassing its employees' collective bargaining representative and dealing directly with employees concerning changes in employees' schedules.

(f) Unilaterally changing the method of scheduling vacations without bargaining with its employees' collective bargaining representative.

(g) Discriminating against applicants because of their union and protected activity.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the unilateral change in discipline for no call/no show attendance infractions, if it has not already done so in subsequent bargaining with the BCTGM Local 111 and Teamsters Local 878.

(b) Rescind the unilateral change in scheduling vacations, if it has not already done so in bargaining with the BCTGM Local 111 and Teamsters Local 878.

(c) Upon request, bargain collectively with the BCTGM Local 111 as the exclusive collective bargaining representative of the employees in the Production and Sanitation Unit specified above, and if requested by the Union, rescind the unilateral changes in classifications and/or rates of pay.

(d) Upon request, bargain collectively with the Teamsters Local 878 as the exclusive collective bargaining representative of the employees in the Shipping, Receiving and Maintenance Unit specified above, and if requested by the Union, rescind the unilateral changes in the schedule for maintenance employees.

(e) Within 14 days from the date of this Order, make whole any employees for any loss of pay or other benefits, including interest, that they may have suffered as a result of the unlawful unilateral changes found above and prior to such time that Southern reached an agreement with their collective bargaining representative.

(f) Within 14 days from the date of this Order, offer employment to Michael W. Chamlee in his former job or a substantially equivalent position, without prejudice to his seniority or any other right or privilege that he would have accrued had he been offered employment on March 28, 2005. Additionally, make whole Michael W. Chamlee for any loss of earnings suffered as a result of its failure to hire him on March 28, 2005.

(g) Within 14 days from the date of this Order, remove from its files any reference to the failure to hire Michael W. Chamlee or to the disciplinary warnings issued to him by Meyer's in August 2004 and March 2005, and within three days thereafter notify him in writing that it has done so and that the personnel action will not be used against him in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Hope, Arkansas facility, copies of the attached notice marked "Appendix B."[18] Copies of

[18] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" Continued

the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 2004.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 12, 2006.

Margaret G. Brakebusch
Administrative Law Judge

shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten our employees with discipline, discharge, or unspecified reprisals if they engage in union or other protected concerted activity.

WE WILL NOT discriminate against employees by issuing disciplinary warnings to them because they engage in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL expunge from our records and files any reference to the written discipline issued to Michael W. Chamlee on August 20, 2004 and March 17, 2005, and notify him in writing that this has been done.

WE WILL request that Southern Bakeries, LLC expunge from our records and files that are in its possession, all records referencing or relating to the discipline issued to Michael W. Chamlee on August 20, 2004 and March 17, 2005. **WE WILL** notify Michael W. Chamlee in writing when we have made this request to Southern Bakeries, LLC.

MEYER'S BAKERIES, INC.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in

1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

The Brinkley Plaza Building, Suite 350, 80 Monroe Avenue, Memphis, TN 38103-2416
(901) 544-0018, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (901) 544-0011.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to bargain with the collective bargaining representative of our employees by making unilaterally changes in discipline for attendance infractions, the method of scheduling vacations, classifications, pay rates, or schedules for our employees.

WE WILL NOT bypass our employees' collective bargaining representatives and deal directly with employees concerning wages, hours, or conditions of employment.

WE WILL NOT fail or refuse to hire individuals because they engage in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, at the request of Teamsters Local 878, rescind the method of scheduling employee vacations and the change in imposing harsher discipline for no call/no show attendance fractions.

WE WILL, at the request of Teamsters Local 878, rescind the changes in employees' schedules, classifications or pay rates, and the revocation of wage increases.

WE WILL, at the request of BCTGM Local 111 rescind the unilateral change in the method of scheduling vacations and the change in imposing harsher discipline for no call/no show attendance infractions.

WE WILL, at the request of BCTGM Local 111, rescind the changes in employee classifications or pay rates.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Michael Chamlee to the job he previously performed for Meyer's or if that position no longer exists, to a substantially equivalent position, without prejudice to seniority or any other right or privilege that he would have enjoyed had he been offered employment on March 28, 2005.

WE WILL, within 14 days from the date of the Board's Order, make Michael Chamlee whole for any loss of earnings and other benefits plus interest resulting from our failure to hire him on March 28, 2005.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the failure to hire Michael Chamlee on March 28, 2005 and any reference to the disciplinary warnings issued to him by Meyer's in August 2004 and March 2005, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that our failure to hire him and the disciplinary warnings will not be used against him in any way.

Southern Bakeries, LLC

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representative and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

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